United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1906.

No. 1682.

No. 5, SPECIAL CALENDAR.

J. BARTON MILLER, APPELLANT,

vs.

JOHN E. PAYNE, EXECUTOR; LORRAINE E. HOLDER, HARRY S. PAYNE, LILLIE P. MERRILL, AND JOHN E. PAYNE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 11, 1906.

In the Court of Appeals of the District of Columbia.

No. 1682.

J. BARTON MILLER, Appellant,
vs.
JOHN E. PAYNE ET AL.

1–5 WASHINGTON, D. C., *Sept.* 6, 1894.

Know all men by these presents that I Priscilla R. Payne of Washington District of Columbia being of sound and disposing mind and memory do make publish and declare this instrument to be my last will and testament I give, devise, and bequeath all my real property described as follows lot "139, square 65," situated on Dumbarton Avenue West Washington "and lot" 79 square 72, situated on Dumbarton Avenue West Washington;" this property to be sold one year after my death and the proceeds to be divided equally between my children "John E. Payne," Lorraine E. Holder" "Harry S Payne," "Walter W. Payne," Lily M. Payne." Also two lots situated in the Town of Charlton Heights Prince George County Maryland to be sold and the proceeds to be divided equally between John E. Payne Lorraine E. Holder, Harry S. Payne Walter W. Payne Lily May Payne.

I hereby appoint my son John E. Payne Executor of this will without bond.

In witness whereof I hereunto set my hand and seal this the Sixth day of September A. D. 1894.

(Signed) PRISCILLA R. PAYNE.

Witnessess:

1. CHAS. W. BROWN.
2. RICHARD L. QUIGLEY.
3. SAMUEL W. HENRY.

Signed, sealed, published and declared to be the last will and testament of Priscilla R. Payne in presence of us witnessess who at her request and in her presence and in presence of each other have hereunto set our hands and seals the day and the year above mentioned.

* * * * * * *

6 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In re Estate of PRISCILLA R. PAYNE, Deceased. No. 12371.

Your petitioner, John E. Payne, respectfully represents:

1. That he is a citizen of the United States and a resident of the District of Columbia, and files this petition as Executor under the last will and testament of the said Priscilla R. Payne.

2. That the said Priscilla R. Payne, who was also a citizen of the United States and a resident of the District of Columbia, departed this life on the 25th day of July, 1904, while temporarily residing for the summer at Hyattsville, State of Maryland.

3. That the said Priscilla R. Payne left a last will and testament bearing date the 6th day of September, 1894, and by the provisions of the same your petitioner is named as Executor, and exempted from furnishing bond for the faithful discharge of his trust. Said will has been duly filed in this court for probate.

4. That the said Priscilla R. Payne, deceased, left surviving as her sole next-of-kin and heirs-at-law five children, all adults, whose names and residences are as follows:

7 John E. Payne, of the District of Columbia, your petitioner.

Lorraine E. Holder, formerly Payne, of the District of Columbia.

Harry S. Payne, Falls Church, Va.

Walter W. Payne, Hyattsville, Md.

Lily Payne Merrill, formerly Payne, District of Columbia.

All of whom, except your petitioner, have signed a written consent that said will be admitted to probate and record, and letters testamentary issue to your petitioner, and the same has been duly filed herein.

5. That the said Priscilla R. Payne, deceased, died seized and possessed of the following real and personal property situated and described as follows: Lot 139, in Square 1235, known as 2816 Dumbarton Avenue, and Lot 79, in Square 1242, known as 3013 Dumbarton Avenue, in the District of Columbia. The assessed value, according to the records of the Assessor's Office of the District of Columbia, of the former is $1040.00 and of the latter $1960.00, and two unimproved lots in Charlton Heights, Prince George County, Maryland, the value of which your petitioner is unable to state; and one small lot of plated ware and piano, estimated to be worth about $225.00; and possessed of no other real or personal property, to the best of your petitioner's knowledge and belief.

6. That the outstanding indebtedness against said estate, including funeral expenses, will not exceed the sum of $250.00, to the best of your petitioner's knowledge and belief.

Wherefore the premises considered, your petitioner prays:

1. That said will be admitted to probate and record, and

8 & 9 letters testamentary issue to him as Executor thereunder, and,

2. For such other and further relief in the premises as the nature of the case may require.

JOHN E. PAYNE.

I do solemnly swear that I have read the foregoing petition by me subscribed and know the contents thereof; that the things therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

JOHN E. PAYNE.

Subscribed and sworn to before me this 11th day of August, A. D. 1904.

[NOTARIAL SEAL.] ABNER Y. LAKENAN.

(Endorsement: Petition of John E. Payne for probate of will and letters testamentary. Filed Aug. 12, 1904. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

* * * * * * *

10–20 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In re Estate of PRISCILLA R. PAYNE, Deceased. No. 12371.

Upon consideration of the petition of John E. Payne and the written consent of all the next-of-kin and heirs-at-law filed herein, and it appearing to the Court that the last will and testament of said deceased, dated September 6th, 1894, filed herein, has been duly proven by all the attesting witnesses thereto, and no objection having been signified to the Court,

It is this 6th day of September, A. D. 1904, *adjudged, ordered,* and *decreed* that said will be, and the same is, hereby admitted to probate and record, and that letters testamentary issue to the petitioner, John E. Payne, the Executor named in said will, upon his giving bond in the penalty of Five Hundred dollars, conditioned for the faithful discharge of his trust.

By the Court:

THOS. H. ANDERSON,
Associate Justice.

(Endorsement: Order admitting will to probate and record, and granting letters testamentary to John E. Payne. Filed Sep. 6, 1904. James Tanner, Register of Wills, D. C. Clerk of Probate Court.)

* * * * * * *

21–29 Supreme Court of the District of Columbia, Holding a Probate Court.

Inventory of Money and Debts Due to Deceased.

Cash in bank.....	$28 00
W. G. Moore for rent due at time of death.....	45 00
W. W. Payne by loan.....	2588 75
	$2661 75

DISTRICT OF COLUMBIA, *To wit:*

I, John E. Payne, Executor of Priscilla R. Payne late of the District of Columbia, deceased, do solemnly swear that the foregoing schedule is a true and perfect inventory of all the Money belonging to the deceased, and of all the Debts due to the said deceased, which have come to my hands or knowledge, and that I will well and truly charge myself with all money and all and every such debt or debts as shall hereafter come to my knowledge or possession.

JOHN E. PAYNE.

Sworn to and subscribed before me, this 21st day of March A. D. 1905.

WM. C. TAYLOR,
Deputy Register of Wills for the District of Columbia,
Clerk of the Probate Court.

(Endorsement: Inventory of Money and Debts. $2661.75. Filed Mar. 21, 1905. James Tanner, Register of Wills, D. C. Clerk of Probate Court.)

* * * * * * *

30 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In re Estate of PRISCILLA R. PAYNE, Deceased. Adm., No. 12371.

It appearing to the Court that John E. Payne, Executor under the last will and testament of Priscilla R. Payne, deceased, has filed a statement for his first account herein as such Executor;

And it further appearing to the Court in and by said statement that Walter W. Payne, one of the legatees under said will, is alleged to be indebted to the estate in a large sum of money and in excess of his probable distributive share for alleged divers loans made to him by the said Priscilla R. Payne in her life time;

And it further appearing to the Court that after the death of the said Priscilla R. Payne the said Walter W. Payne assigned all of his interest in said estate to one J. Barton Miller, who claims a distributive share of the said estate by reason of said assignment;

And it further appearing to the Court that the right of the said J. Barton Miller to a distributive share of the said estate is denied by said Executor by reason of the said alleged indebtedness
31 of said Walter W. Payne to the said estate;

It is this 13th day of November, A. D. 1905, adjudged, ordered, and decreed that this matter be, and the same hereby is, referred to James G. Payne, Auditor, for the purpose of stating the account of the said Executor and making distribution of the estate in his hands to the parties entitled thereto, and in so doing to hear whatever evidence may be offered on behalf of the parties interested.

It is further ordered that the said Auditor make such reasonable

allowance to the attorneys representing the Executor as he may deem proper.

By the Court:

WENDELL P. STAFFORD,
Associate Justice.

I consent to above.
JESSE H. WILSON,
Att'y for J. Barton Miller.

(Endorsement: Order referring account of Executor to the Auditor. Filed Nov. 13, 1905. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

32 In the Supreme Court of the District of Columbia.

In re PRISCILLA R. PAYNE. No. 12371, Administration.

This cause is referred to me to state the account of the executor and distribution of the estate in his hands to the parties entitled thereto, and to that end to take such evidence as may be offered by the parties. I am also directed to report a reasonable allowance to the attorneys representing the executor. After due notice I proceeded with the reference.

The executor filed his account in November 1905 and so far as the said account stated the assets and receipts of the estate, as well as the expenditures for which credit is claimed by the executor, no exception appears to be made. The items which are not specifically stated in the account are the executor's commission, an allowance for attorneys' fees as well as the costs of the proceeding.

The controversy between the parties arose over the claim of J. Barton Miller under a conveyance to him by one of the parties entitled to an interest in the estate under the will of the testatrix. The facts in the premises as established in the proof here are as follows: The will of the testatrix was made on the 6th of September 1894; by it she devised and bequeathed her real property described as lot
139 in square 65 and lot 79 in square 72 both situated on
33 Dumbarton Avenue, West Washington, to be sold one year
after her death and the proceeds divided equally between her children, John, Loraine, Harry S., Walter W. and Lilly May. The will also made a similar devise of the realty in Prince George County Maryland, which is not included in the present accounting.

In October 1898 the said Priscilla R. Payne borrowed the sum of $1,000 from the American Security and Trust Company of this City which she advanced to her son Walter W. Payne to provide means for the purchase by him of a half interest in a hotel in Upper Marlboro Maryland. This loan was secured by a conveyance made by the said Priscilla of part of the real estate owned by her to the trustees.

In June 1903 the said Priscilla Payne borrowed from the Washington Six Per Cent. Permanent Building Association the sum of $1800, a portion of which represented by checks of the said Asso-

ciation drawn to the order of the said Priscilla R. Payne was by her delivered to Walter W. Payne as appears by his endorsement upon two of these checks, one for $97.50 and the other for $100. Out of this loan the note of Mrs. Payne given to the American Security and Trust Company as above stated was paid, it then amounting to $1133. A balance of the loan also represented by a check of the Association for $342.25 delivered to the said Priscilla was by her endorsed and delivered to Walter W. Payne.

34 In November 1903 the said Priscilla R. Payne borrowed another sum of money from the First Coöperative Building Association of Georgetown, the repayment of which was also secured by a conveyance of real estate in trust. This loan was issued in checks of the said Association, one of $250 to the order of the said Priscilla and by her delivered to the said Walter W. Payne as appears by his endorsement. The following checks also issued by the said Association to her order were by her endorsed and delivered to the said Walter as appears by his endorsement, $197.50 and $100.00. It is convenient to note at this point that the said J. Barton Miller was the Secretary of the said First Coöperative Building Association of Georgetown and as such signed the several checks of that Association just hereinbefore enumerated.

These several deliveries of money by the testatrix to the said Walter W. Payne were made several years after the making of her will, and the proof taken in this reference clearly establishes her intention that these deliveries were intended as advancements on account of his share in the estate and to be adjusted in such manner as to equalize the distributive portions of all of the devisees. It is further established that Walter was informed of that intention and condition by the testatrix and after her death the making of the said advancements was admitted by him.

35 The testatrix died on the 25th of July 1904 and upon due proceedings in Probate the will was admitted to probate and record and letters testamentary issued to the executor John E. Payne on the 28th of September 1904. On the 21st of March 1905 the executor filed an inventory of personal estate and of money and debts due the estate, in which it is stated that Walter W. Payne is indebted to the estate in the sum of $2588.75.

By a deed dated the 26th of November 1904 the said Walter W. Payne undertook to convey to the said J. Barton Miller in consideration of the sum of $10 all of the grantor's right, title and interest in and to one undivided fifth of all real, personal and mixed estate in the District of Columbia, in the State of Maryland and elsewhere of which the said Priscilla R. Payne died seized and possessed and which descended to the said Walter as one of her five heirs at law.

In accordance with the direction of the will of the testatrix the real estate was sold and the proceeds taken up in the account of the executor. J. Barton Miller claims distribution under the aforesaid conveyance of one-fifth of the personal assets and of the proceeds of the real estate. The other devisees object to this claim on the ground that the advances made to Walter W. Payne by the testatrix are

liens upon and chargeable against the said one-fifth distributive share.

36 Unquestionably both the personal and real estate of the testatrix were chargeable with the debts of the estate and any conveyances made by a devisee or heir at law without opportunity to creditors to establish their claims and until the lapse of a reasonable period of time, would be subject to such debts. I refer to this, not because there were debts owing by this estate but as illustrating the necessity of a full examination by parties contemplating purchase of interest of devisees or heirs at law of the conditions both of title and of the proceeding in the administration of the estate. It is conceded that such inquiry was not made by Miller, before purchasing the interest of Walter W. Payne. In his own testimony he states that the only investigation by him was a direction to his attorney to ascertain whether Walter W. Payne had made any conveyance of his interest. This only necessitated a brief examination of the record of the deeds and mortgages. Had he made inquiry of the executor at any time or examined the proceeding in the Probate Court after the filing of the inventory he would have easily ascertained the contention made by the executor and other parties in interest with reference to the advancements made to Walter W. Payne. So far as the personal assets are concerned settlements of the estate cannot be safely made until the lapse of one year from the issue of letters testamentary or of administration. The

37–40 conveyance to Miller was made in less than three months after the filing of the will and letters testamentary issued. The direction of the will for the sale of the real estate and division of the proceeds worked a conversion of that realty into personal estate under the rules of the Court of Appeals of this District.

I have already referred to the fact that Miller as an Officer of the First Coöperative Building Association of Georgetown had knowledge of the loans made by that Association to the testatrix and either he or other officers of that body should have known from an examination of the checks when they were returned that the money borrowed by the testatrix was delivered to Walter W. Payne.

Upon the conditions appearing in the proof and in the records of the case I feel bound to find that J. Barton Miller in accepting a conveyance of the interest of Walter W. Payne took it charged with the advancements made by the testatrix and I have stated the distribution in this account accordingly.

JAS. G. PAYNE, *Auditor.*

* * * * * * *

41 & 42 SCHEDULE B.

Distribution.

Balance from schedule A. Cash		1,691.49
Household effects		105.55
		1,797.04
Share of Walter W. Payne	$359.40	359.40
		1,437.64
Retained from this share to pay note held by National Bank of Southern Maryland	50.00	309.40
Balance of this share applied on account of advances (see report)		1,747.04
To Lorraine E. Holder, One-fourth household effects	26.38	
One-fourth of cash	410.38	436.76
Harry S. Payne, One-fourth chattels	26.39	
One-fourth cash	410.37	436.76

* * * * * * *

43 SCHEDULE C.

Account of Rents Collected by John E. Payne.

Amount collected		353.50
CR.		
By Taxes paid	48.85	
" Water rent paid	13.75	
" Cost of repairs	53.49	
" Rent refunded to purchaser	3.52	
" Compensation to John E. Payne, as agent	17.68	
" Auditor's fee	5.00	142.29
		211.21

Distribution.

To Lorraine E. Holder, One-fourth	52.80	
Harry S. Payne, the same	52.80	
44 To Lillie Payne Merrill, the same	52.80	
John E. Payne, the same	52.80	
Fractions	.01	
	$211.21	

JAS. G. PAYNE, *Auditor.*

45 *In re* PRISCILLA R. PAYNE.

WEDNESDAY, *December* 13, 1905, at 2 p. m.

Hearing pursuant to notice.

Present: Messrs. Wilson and Ridout for Mr. J. Barton Miller, Messrs. Smith Thompson and Hendler for the executor and certain *and* the legatees.

Mr. RIDOUT: Counsel for J. Barton Miller, assignee of Walter W. Payne desire to state on the record that in participating in this reference they do not waive their contention of the want of jurisdiction of the Probate Court to adjudicate the questions involved in this reference.

Mr. C. A. M. WELLS having been sworn testified as follows:

By Mr. HENDLER:

Q. I believe you negotiated the sale of the hotel property at Marlboro to a man by the name of Gore and to Walter W. Payne? A. I did.

Q. Now will you please tell us what you know about Walter Payne acquiring the money that was paid for his share on that property?

Mr. RIDOUT: I object on the ground that it is immaterial.

46 The AUDITOR: The ruling is reserved.

A. Mr. Gore came to me with reference to purchasing the Farmer Hotel at Upper Marlboro, I think some time in 1899, I am not sure about that, and the amount necessary for a cash payment was $2,000 at that time. Mr. Payne, Walter Payne I knew at that time, I told him about the sale of this property to Mr. Gore and he said he had some experience in hotel business and he would like to come in with Mr. Gore on the deal. I believe he and Mr. Gore made some agreement about how the hotel should be run and the $1,000 that Mr. Payne was to pay the cash payment, he asked me to get for him through the American Security and Trust Company on some property of his mother's in Georgetown.

Mr. RIDOUT: I object as immaterial.

The AUDITOR: The ruling is reserved.

Q. Was the money borrowed through the American Security and Trust Company on that property?

Mr. RIDOUT: I object.

A. Yes.

Q. To whom was that money given?

Mr. RIDOUT: Are you speaking from your personal knowledge?

A. Yes. That money was either paid through me to Mr. Tucker the owner of the hotel or paid by Mr. Payne to Mr. Tucker, I am not able to state which.

47 Q. At any rate the amount borrowed represented the payment of Walter W. Payne for his half interest in the purchase of that hotel? A. Yes.

Mr. HENRY H. BERGMAN having been sworn testified as follows:

By Mr. HENDLER:

Q. You are Treasurer of the Washington Six Per Cent. Permanent Building Association? A. Yes.
Q. Did your association lend Priscilla R. Payne any money? A. Yes.
Q. What was the amount?
Mr. RIDOUT: Was the transaction in writing?
A. Yes, all loans are in writing.

Mr. RIDOUT: I object as the written instrument is the best evidence and further because it is immaterial.
The AUDITOR: The objection is overruled.

A. The total amount loaned was $1800.
Q. Were those payments made by check? A. Yes.
Q. Have you the checks with you, three checks were there not? A. I brought three checks with me, I was requested to bring these and I have them here.

48 Mr. HENDLER: I offer these checks in evidence.
Mr. RIDOUT: I object.
Mr. HENDLER: I offer in evidence Check No. 9793 dated June 1, 1902 drawn by H. H. Bergman, Treasurer, on the Second National Bank to the order of Priscilla R. Payne for $1500 endorsed by Priscilla R. Payne and Julius A. Maedel; Check No. 9887 drawn by H. H. Bergman Treasurer, on the Second National Bank to the order of Priscilla R. Payne for $97.50 endorsed by Priscilla R. Payne and Walter W. Payne; and Check No. 10,205 drawn by H. H. Bergman Treasurer, to the order of Priscilla R. Payne on the Second National Bank dated December 15, 1903 for $100 endorsed by Priscilla R. Payne and Walter W. Payne.
Mr. RIDOUT: I object as immaterial.

Mr JULIUS A. MAEDEL having been sworn testified as follows:—

By Mr. HENDLER:

Q. You are Attorney for the Washington Six Per Cent. Permanent Building Association? A. Yes.
Q. There was a check put in evidence endorsed by you for $1500, dated June 1, 1903 will you please state what the distribution of that loan was?

Mr. RIDOUT: I object as attempting to contradict a written instrument.

49 The AUDITOR: The objection is overruled.

A. That check represented the amount of a loan made by the Washington Six Per Cent. Permanent Building Association to Pris-

cilla R. Payne on East half of lot 79 in square 1242. Upon an examination of the title, I found a deed of trust on the property made October 10, 1898 to secure the American Security and Trust Company for a note of Priscilla R. Payne for $1100. I had to take up this trust, and for that reason had this check cashed, deposited the money paying off this trust to the American Security and Trust Company the amount of which was $1133.

Mr. RIDOUT: I object as immaterial, the best evidence being the written instrument.

A. I did not know the exact amount of interest so I drew a check for the amount and paid it in cash.

Q. To the American Security and Trust Company? A. Yes and had the trust released and in that regard I will state the balance of $342.25 for which amount I gave a check dated June 3, 1903 on the Second National Bank payable to the order of Priscilla R. Payne, that check was endorsed by Priscilla R. Payne and below that Walter W. Payne.

Mr. HENDLER: We offer that check in evidence.

Mr. RIDOUT: I make the same objection.

50 Mr. HENDLER: The last check offered in evidence is No. 1052.

Mr. HARRY M. PACKARD having been sworn testified as follows:

By Mr. HENDLER:

Q. What is your connection with the Lawyers Title Company? A. Assistant Secretary.

Q. Did your Company have anything to do with the lending to Mrs. Priscilla R. Payne by the American Security and Trust some money on lot 79 in square 72? A. Yes.

Q. Did your Company distribute the amount of that loan? A. Yes.

Q. Will you please state what the distribution of that fund was?

Mr. RIDOUT: I make the same objection to this testimony as to the former and the further objection that this seems to be the same transaction about which Mr. Maedel testified.

A. $1100 was received by us from the American Security and Trust Company distributed as follows: $11 check to C. M. Wells commission, one per cent., commission of the American Security and Trust Company one per cent. $11, $5 for trust, $41.70 for title

51 and recording fee and the balance was paid over to Priscilla R. Payne by our check endorsed by her over to C. A. M. Wells, the balance $1031.30 check No. 166 dated October 11, 1898 drawn by F. Smith, Secretary to the order of Priscilla R. Payne and endorsed Priscilla R. Payne, and C. A. M. Wells.

Mr. HENDLER: We offer that check in evidence.

Mr. RIDOUT: We object on the grounds heretofore stated.

Mr. GEORGE W. KING having been sworn testified as follows:

By Mr. HENDLER:

Q. You are the treasurer of the First Coöperative Building Association of Georgetown? A. Yes.

Q. Did your Association lend any money to Priscilla R. Payne deceased? A. Yes.

Q. Have you with you the checks representing the loan? A. Yes.

Q. Please let me have them?

Witness produces checks.

Mr. HENDLER: We offer in evidence Chek. No. 13051 drawn by A. B. Jackson President and J. Barton Miller Secretary, on the Farmers & Mechanics National Bank dated November 18,
52 1903 to the order of Priscilla R. Payne for $250., endorsed by Priscilla R. Payne and Walter W. Payne.

Mr. RIDOUT: I reserve the same objection.

Mr. HENDLER: Also check No. 13052, dated November 18, 1903, drawn by A. B. Jackson President and J. Barton Miller Secretary to the order of Jesse A. Wilson for $18.50 endorsed Jesse A. Wilson and George W. King Treasurer.

Mr. RIDOUT: I object because in its present form it shows no connection whatever with this transaction.

Mr. HENDLER: We offer check No. 13053 dated November 18, 1903 drawn by A. B. Jackson President and J. Barton Miller Secretary to the order of Priscilla R. Payne for $31.50, there is a memorandum on the face of the check that it is the balance of the $300 advanced.

Mr. RIDOUT: I object.

Mr. HENDLER: The check is endorsed by Priscilla R. Payne and George W. King Treasurer, and also Check No. 13055 dated November 18, 1903 drawn to the order of Priscilla R. Payne by J. Barton Miller Secretary for $100, endorsed by Priscilla R. Payne and George W. King Treasurer.

Q. Do you know what those checks represent? A. I cannot, I suppose a loan.

Q. Do they not represent a loan by your Association to Priscilla R. Payne? A. There is no doubt about it.

53 —. Do you know to whom you turned that $100 over? A. There is no doubt that Mrs. Payne drew it because there is her endorsement on the back.

Mr. HENDLER: I offer in evidence Check No. 13089, dated December 2, 1903 drawn by A. B. Jackson President and J. Barton Miller Secretary to the order of Priscilla R. Payne, for $97.50.

Mr. RIDOUT: I object to any checks that do not on their face purport to have been paid to Walter W. Payne.

Mr. HENDLER: Check No. 13089 is endorsed by Priscilla R. Payne and Walter W. Payne, I also offer Check No. 13365 dated April 25, 1904 drawn by A. B. Jackson President and J. Barton Miller Secretary to the order of Priscilla R. Payne for $197.50 endorsed by Mrs. Priscilla R. Payne and Walter W. Payne, also Check No. 13400 dated

May 9, 1904 drawn by A. B. Jackson President and J. Barton Miller Secretary drawn to the order of Priscilla R. Payne for $100 endorsed by Priscilla R. Payne and Walter W. Payne, all of these checks being counter-signed by George W. King, Treasurer drawn on the Farmers and Mechanics National Bank.

Q. Those checks Numbers 13051, 13089, 13365 and 13400 represent loans made by your Association to Priscilla R. Payne?

Mr. RIDOUT: I object as leading.

Q. What do they represent? A. Represent checks issued by the Association to Mrs. Payne.

54 Q. For what purpose were they issued to her? A. I haven't any idea.

Q. Don't you know that they represent moneys loaned by your Association?

Mr. RIDOUT: I object.

A. I just know that it was money loaned or advanced by the Association to Mrs. Payne, I don't know for what purpose.

Q. These two checks dated November 18, 1903, No. 13052 and 13053, do you know what they represent? A. I would have to be guided by the face of the check I could not possibly remember back as far as 1903, probably some fee in connection with the transaction with the Building Association.

Mr. JOHN E. PAYNE having been sworn testified as follows:

By Mr. HENDLER:

Q. You are the son of the late Priscilla R. Payne and executor of her will? A. Yes.

Q. What if anything has your mother ever said to you about having loaned money to your brother Walter in connection with the Marlboro hotel?

Mr. RIDOUT: I object under Section 1064 of the Code.

Mr. HENDLER: We offer this testimony under Section 1630 of the Code.

55 The AUDITOR: I will admit the evidence reserving the ruling.

A. She stated to me that she had made a loan to him to go into business for which she had given a deed of trust upon her house 3013 Dumbarton Avenue.

The AUDITOR: The ruling is reserved.

Mr. HARRY S. PAYNE having been sworn testified as follows:

By Mr. HENDLER:

Q. You are the son of Mrs. Priscilla R. Payne, deceased? A. Yes.

Q. What if anything have you heard your Mother say in regard to what was required in case she had advanced any money to her children, after her death?

Mr. RIDOUT: I object to the testimony of the former witness as heresay and it not having been shown that Walter W. Payne was present when the statement was made, I object to the testimony of this witness on the same ground and further under Section 1064 of the Code.

The AUDITOR: The ruling is reserved with leave to counsel to subsequently move to strike out.

A. Why it was an understood thing that anything any of us got would be deducted from our part at her death.

56 Q. How often did you hear her say that Mr. Payne?

Mr. RIDOUT: I make the same objection.

A. She said that a number of times, on one occasion, I went to her, I think it was in March 1904, I was going to buy a place over in Virginia and I went to get a little money from her, she agreed to let me have $5 a month, she got a little memorandum book——

Mr. RIDOUT: I object.

The AUDITOR: The ruling is reserved.

A. (Continuing:) Which she made me put down in it the items, so she could keep account of it. On three different occasions she loaned me the five dollars which I put down in the account.

Q. What did she say to you at this time? A. She told me that any money she would advance, she told me that before she loaned me any, she said I want you to understand that any money I loan you, will come out of your share, that is the reason she made me keep the book.

Q. What if anything did she say to you about the share of the other children? A. Well she said if any of them got anything from her, it would come out of their part.

Q. Do you know J. Barton Miller? A. Yes.

Q. Have you ever had any talk with him in regard to this

57 money loaned by the Building Association of which he is Secretary to your Mother? A. Yes, I saw Mr. Miller twice, once I went there, and we talked about it, I did not know then that he was interested in it, he also told me of the indebtedness on the house which he gave me a memorandum of. I asked him about getting money and he told me that the money was all gotten for Walter that was on two occasions. I got this memorandum from Mr. Miller I think on January 7, that amount was covered by the loan of $800.

Mr. RIDOUT: What are you reading from?

A. A memorandum Mr. Miller gave me on that date.

Q. What did he say?

Mr. RIDOUT: I object on the ground that the rights of Mr. Miller had been fixed long prior to this alleged conversation and anything he said could not be material to this controversy.

The AUDITOR: The ruling is reserved.

Q. Do you know what property that loan was on? A. 2816 Dumbarton Avenue.

Mrs. LILLY P. MERRILL having been sworn testified as follows:

By Mr. HENDLER:

Q. Mrs. Merrill you are the daughter of Mrs. Priscilla R. Payne, deceased? A. Yes.

58 Q. What have you ever heard your mother say in regard to what should be done in case any advances had been made to any of the children?

Mr. RIDOUT: I make the same objection?
The AUDITOR: The ruling is reserved.

A. It would come out of their share at her death.
Q. How often have you heard her say that? A. A number of times.

Mrs. LORRAINE P. HOLDER having been sworn testified as follows:

Q. You are a daughter of Mrs. Priscilla R. Payne? A. I am.
Q. What if anything has your mother said to you in regard to any moneys being advanced to her children?

Mr. RIDOUT: I make the same objection.
The AUDITOR: The ruling is reserved.

A. Why, it would come out of our shares at her death.
Q. Just state briefly how your mother said that to you? A. Why in regard to the Marlboro property purchasing the hotel, why there were two gentlemen called at the house one day and wanted to go through the house, one said there was a loan made on the house, I said there must be some mistake, he said no Mrs. Payne was

59 going to get a loan for Mr. Payne, so I showed them through the lower part of the house, he said there was a $1100 loan on the house and that the house was well worth that. Mother was away at the time and when she returned I asked her about it and she said that Walter had been talking about going away but now he wanted to go into business with Mr. Gore and she was going to loan him the money to do it and then he would be near her, I objected very strongly to it, and she said you will not be any worse off for it, Walter understands that whatever he gets during my life time will be deducted from his share at my death.

Mr. RIDOUT: I move to strike out the whole statement, as hearsay, I object to the conversation with some unknown gentlemen in the absence of Mrs. Payne.
The AUDITOR: The objection to that portion of the answer will be sustained, to the rest the ruling is reserved.

Q. What property was that loan made on? A. 3013 Dumbarton Avenue in which house I was living.
Q. Did your Mother live there? A. Mother boarded with me.
Q. What did your Mother say in regard to 2816 Dumbarton Avenue? A. She spoke about two loans on 2816.
Q. What did she say? A. One for $250 or $300 in November

1903, it was either $250 or $300, she said Walter was very
60 much embarrassed and she was going to the Building Association with him and all she had to do was to sign a note and he could get this money.

Q. Do you recall an instance in May 1904? A. It was in May before Mother died, when she came in very much worried just about noon or half past twelve, I asked her where she had been and she said she had been to the Building Association she had an appointment at 11 o'clock to meet Walter and she was going to borrow some money out of the Association, she had to go and endorse his notes.

Q. You saw those checks that were offered in evidence from the Building Association? A. I did.

Q. Are you familiar with the hand writing of your brother Walter W. Payne? A. I am.

Q. Have you seen him write? A. I have.

Q. Were those signatures endorsed on the back of the checks the signatures of Walter W. Payne? A. They were.

Q. They were his signatures? A. Yes.

61 By Mr. RIDOUT:

Q. You spoke of living at 3013 Dumbarton Avenue, at the time the loan was made? A. Yes.

Q. Was your Mother living in that house? A. Yes.

Q. Were you paying any rent? A. I was.

Q. In money or charging board? A. By charging board.

MRS. LILLY P. MERRILL is recalled.

Q. Did you see the checks from the Building Association? A. Yes.

Q. Were they endorsed by Walter W. Payne? A. Yes.

Q. Are you familiar with your brother's handwriting? A. Yes.

Q. Have you seen him write? A. Yes.

Q. Whose signature was that on the back of the checks? A. My brother's Walter W. Payne's.

Mr. WILLIS B. HOLDER having been sworn testified as follows:

Q. Are you familiar with the hand writing of Walter W. Payne? A. I am.

62 Q. Have you seen him write? A. Yes.

Q. Did you see the checks issued by the Building Association and offered here this morning? A. Yes.

Q. Were they endorsed by Walter W. Payne? A. Yes.

Q. Whose signature was that endorsement in? A. Walter W. Payne's.

Q. Walter W. Payne, son of Mrs. Priscilla R. Payne? A. Yes.

EZRA W. RAUB having been sworn testified as follows:

Q. Were you acquainted with Mrs. Priscilla R. Payne? A. I have known her for 25 years, nearly all my life.

Q. Did you ever visit at her house? A. Once a week for years.

Q. What if anything has Mrs. Payne ever said to you in connection with Walter going into business in Marlboro?

Mr. RIDOUT: I object on the ground that it is heresay Walter Payne not being present.

The AUDITOR: I will admit the testimony.

A. Well Mrs. Payne told me sometime prior to Walter going into Marlboro, that he wanted some money and she said she could get it by going to the Building Association, she borrowed it there and gave it to her son Walter.

Q. Is that what she said? A. Yes.

63 Q. What if anything did she say to you about equalizing the portions of her children? A. She told me a number of times that she intended her children to all share alike.

Q. In that connection, what did she say as to money advanced? A. She told me that she had advanced Walter quite a good deal of money, almost more than he ought to have.

Q. What if anything did she say about equalizing that money advanced? Q. If he had received more than he ought to have that he should return it to the estate, that they were all to share alike.

Mr. RIDOUT: I object.

Q. What if any thing did Walter Payne himself say to you in connection with having borrowed money?

Mr. RIDOUT: I object.

Q. When has Walter Payne spoken to you about this matter? A. He spoke to me after his mother's death, he came to me to go to the funeral and told me all these things.

Q. About when was that? A. I can't tell.

Q. Was it before the funeral? A. Yes.

Q. What was it he said?

64 Mr. RIDOUT: I object.

A. He told me his mother had loaned him a certain amount of money.

Q. What was the amount? A. I cannot tell the exact amount now.

Q. Are you related in any way to the Paynes? A. No.

Q. To Mrs. Payne or her children? A. I don't know that I am, I married a distant relative of the family and my wife is dead, so that makes me out of the family, I have no interest in it.

By Mr. RIDOUT:

Q. You visited there once a week? A. Mr. Payne and his wife and their children, I have known them for years.

Q. You visited them after your wife's death? A. Before I ever knew my wife.

By Mr. HENDLER:

Q. By Mr. Payne, whom do you mean? A. These girls' father.

Mr. HENDLER: We submit our case.

Adjourned to Wednesday, December 20, 1905, at 2 o'clock.

65 *In Re* the Estate of PRISCILLA R. PAYNE.

WEDNESDAY, *December 27th,* 1905—2:30 o'clock p. m.

Hearing pursuant to adjournment.

Present: Messrs. Hendler, Smith Thompson, Ridout and Wilson.

Mr. RIDOUT: Counsel for the claimant J. Barton Miller moves to strike out the testimony of C. A. M. Wells on the ground that it is wholly irrelevant and does not show any loan by the deceased to Walter W. Payne, and the same motion is made on the same ground as to the witnesses Bergman, Maedel, Packard, and King. As to the witness John E. Payne, that is objected to because he is excluded by Sec. 1064 of the Code and on the further ground that the disclosures of the deceased were not made in the presence of Walter W. Payne, and are inadmissable.

The same objection is made on the same ground to the witnesses Harry S. Payne, Lilly P. Merrill, Willis B. Holder, and Ezra W. Raub.

J. BARTON MILLER having been duly sworn, testified as follows:

By Mr. RIDOUT:

Q. I show you a deed and ask you if you are the party mentioned in that deed? A. I am, Sir.

66 Mr. RIDOUT: Counsel for Mr. Miller offers in evidence a certified copy of a deed from Walter W. Payne and wife to J. Barton Miller, dated November 26th, 1904, to be marked "Miller No. 1."

Q. Do you know where Walter Payne is now? A. I do not. I have not seen him since that deed was executed, to the best of my knowledge and belief.

Q. What, if any, efforts did you make to ascertain his whereabouts? A. I have inquired about him, and I have learned in an indirect way he is not in the District of Columbia.

Q. I observe that the consideration is $10.00; what was the actual consideration paid by you? A. I think it was $200.00.

Q. How was that paid? A. In cash.

Q. How long prior to the date of this deed, if you know, did Mrs. Priscilla Payne die?

Mr. HENDLER: I object as immaterial.

A. I do not recall.

Q. When, if at all, were you advised that any claim was made by the executor of Mrs. Priscilla R. Payne's estate that Walter W. Payne was indebted to that estate? A. Not until the heirs had sold two pieces of property, I joining in as assignee in Walter Payne's interest.

67 Q. At whose request did you unite in those deeds, do you remember? A. At the request of the attorney for the Paynes. I also knowing upon my own account that it was necessary to join in.

Q. Who was the attorney for the Paynes? A. Mr. Smith Thompson is the gentleman with whom I have had negotiations.

Q. At the time when you were requested by Mr. Thompson to unite in these deeds, what, if any arrangement was made concerning your share of the purchase money? A. When the first property was sold, which was the house 2816 Dumbarton Avenue, Mr. *Townsend* said to me that he could not distribute the net proceeds of the sale at that time because the administration year was not up, and that I should leave my interest with the other interests in his hands until some date subsequent to September 26th, 1905.

Mr. HENDLER: I object and move to strike out as hearsay.

The AUDITOR: The objection is overruled.

Q. What arrangement was made between you and Mr. Thompson when the second sale was made? A. It was understood that the proceeds should be deposited in bank to the credit of Messrs.
68 Jesse H. Wilson and Smith Thompson.

Q. What was the purpose of that deposit? A. In order to protect my interest in the matter.

Q. At the time these conveyances were made, what claim, if any, was made against you in respect of the indebtedness of Walter W. Payne? A. No claim whatsoever.

Q. Has any part of the proceeds of either of those properties been paid to you? A. No part of the proceeds of either of those sales have been paid to me.

Q. Mr. Miller, on page 11 of the testimony Mr. Harry S. Payne testifies that he had conversations with you, the dates of which he does not give, in which you told him of the indebtedness secured on the house and told him that the money was all gone for Walter, what have you to say as to the accuracy of that statement? A. That statement is absolutely inaccurate.

Q. Did you make such a statement to him? A. I did not, Sir.

Q. Do you remember the dates of the respective conveyances in which you joined? A. I do not, Sir. The second one, to the best of my knowledge, was made in September.

By Mr. HENDLER:

Q. You are the secretary of the First Coöperative Building
69 Association of Georgetown, are you not? A. Yes.

Q. Is that your handwriting (referring witness to a slip of paper)? A. Yes.

Q. How did you come to purchase this interest of Walter W. Payne? A. I was approached——

Mr. RIDOUT: I object as immaterial.

The AUDITOR: The objection is overruled.

A. (Continuing:) By Mr. Payne. He came to my office and he said his mother was dead, as I had heard, and that he was entitled to a one-fifth interest in the estate. He said that he was in need of

ready money, and as he expressed it, one dollar was worth as much to him at that time as two would be a year hence, when the proceeds of the estate would be distributed. He told me the general hard luck story and asked me to make him an offer for his interest. I was acquainted with these properties of which we have spoken. I knew the amount of trust on one and I took his word at that time for the amount of the trust on the other, and I told him if he would come back the following week, and if I found that he had not conveyed his interest to anyone else, I would give him $200.00 for it.

Q. You are a real estate man yourself? A. Yes.

70 Q. What investigation did you make as to whether or not he had conveyed his interest or as to whether or not he had an interest at all in the estate?

Mr. RIDOUT: I object.

The AUDITOR: The objection is overruled.

A. I requested Mr. Jesse H. Wilson to prepare a deed of conveyance, not to make an expensive examination but just to glance at the records and see if he had conveyed his interest. No written report was made in the matter. The deed was turned over to me, Mr. Payne and his wife executed it and the amount agreed upon was paid him.

Q. Did you know that Mrs. Payne left a will? A. Why, I must have been told at that time.

Q. By whom? A. By Mr. Payne and probably by Mr. Wilson. I was satisfied as to it.

Q. Did you investigate as to the provisions of the will? A. I just asked Mr. Wilson to see if he had conveyed his interest and he said no.

Q. You don't know what the provisions of the will are? A. I do not, except as to what I was told at that time.

Q. Told by Mr. Payne? A. Mr. Payne.

71 Q. Of course you did not know that this money was for Mr. Payne that was borrowed from your building association? A. I knew nothing about that.

Q. In whose handwriting is that entry (handing a passbook to the witness)? A. That is my handwriting.

Mr. HENDLER: I offer in evidence a passbook with the cover reading "22 series, First Coöperative Building Association of Georgetown, D. C., in Account with Mrs. Priscilla R. Payne). The entry offered in evidence is on the fly leaf of the passbook and is as follows: "Nov. 18, 1903, all loans made prior to this date—settled out of $400.00—loan—of Nov. 18, 1903—difference taken by Mrs. Payne and Mr. Payne—partly credited on this book——."

Mr. RIDOUT: I object as immaterial.

Q. How was this request of Mr. Thompson to which you have testified in regard to the first property conveyed to you, Mr. Miller? A. Over the telephone.

Q. Both of these sales were made through you, were they not? A. Through the Miller-Shoemaker Real Estate Company.

Q. But primarily through you? A. No, Sir, through the Miller-Shoemaker Real Estate Company.

72 Q. Who drew the deed in the sale of both of these pieces of property?

A. Well, I think the District Title Company prepared the second one. I don't recall who prepared the first.

Q. You said that you knew that it was necessary for you to join in the deed if you knew the provisions of the will?

Mr. RIDOUT: I object as calling for the construction of the will.

Q. This memorandum that I have shown you, and which you identified, is the memorandum to which Mr. Harry Payne testified when he was on the stand, is it not, Mr. Miller? A. That is a memorandum written by me.

Q. In regard to the sale of the second piece of property, Mr. Miller, didn't you insist on the sale of that property under a threat of filing a suit in equity for partition? A. I did.

Q. So that the sale of that property was brought about by you, was it not? A. Not directly, no Sir.

Q. Well, did Mr. Thompson have anything to do with the initiative of the sale of that property? A. Knowing myself to be one of the interested parties, and as the man who had purchased one-

73 fifth of this particular house, one of my salesmen brought me an offer for this house, which I considered exceptionally fine, and in my judgment which was $500.00 more than the house was worth. I thought that it would be a great mistake to allow that offer to go by, and I submitted it to the other interested parties. They refused to treat with me or with our company, saying that at that time they intended to sell the property themselves and not pay any agent a commission. "Well," I said, "why not sell?" But they did not sell, and I thought that the offer was such a good one and that I would suffer financially and personally if it were not accepted, that I instructed my attorney to attempt to come to an agreement between the heirs; I instructed him to say that unless that offer was accepted, or unless an offer as good was presented by the parties in interest that I would file a bill for partition and sale.

Q. Did you make any claim at all to any part of the proceeds of sale of the first house? A. I accepted a statement from Mr. Thompson in the beginning that it would not be proper to distribute this money until the administration year was up, and as soon as the administration year was up I asked for a distribution, but it was denied me.

Q. This threat for a suit in partition was before the administration year was up, was it not? A. It was before the adminis-

74 tration year was up.

Q. Something like about two months, wasn't it? A. I don't recollect just how long it was. It was very close to the end of the administration year.

Q. Now, when you were threatening these partition proceedings had you made any investigations in the Probate Court as to the con-

dition of the estate and particularly the condition of Walter Payne's interest, if any, in the estate? A. Personally I had not.

Q. Or by an attorney? A. The whole matter was in the hands of my attorney.

Q. So that you did not know that there had been filed in the Probate Court an inventory of debts charging Walter Payne with over $2,500 due to the estate? A. No, that was a matter brought to my attention after the sale of these houses.

Q. So you really, in fact, Mr. Miller, made no investigation at all as to whether Walter Payne was entitled to anything from the estate or not, did you, except the mere fact that you inquired as to whether he had made any other transfer of his share?

Mr. RIDOUT: I object.

A. I had not.

Q. When you were negotiating with Walter Payne for the
75 purchase of the assignment of his share in the estate, did you inquire of the executor or anyone of the beneficiaries? A. I did not.

Mr. RIDOUT: I object, as it was not incumbent upon him to make any such inquiries.

Q. At the time of the sale of this second property, Mr. Miller, didn't you state to Mr. Thompson over the telephone that you were surprised that your claim was being disputed? A. No, not until after it was made.

Q. I mean before the second sale was finally consummated? A. I recall making such a remark, but just as to what time it was I do not know.

Redirect by Mr. RIDOUT:

Q. Do you know what title company examined the title for the first purchase, if any title company did? A. I think not. I think Mr. Wilson examined the title for the purchaser, a man by the name of James.

Q. Who examined for the second purchase? A. The District Title and Insurance Company.

Proof closed on both sides with leave to counsel for Mr. Miller to prove the contents and execution of two deeds conveying this property.

Adjourned.

76 *In re* PRISCILLA PAYNE.

FRIDAY, *February* 23, 1906—2 p. m.

Hearing pursuant to notice.
Present: Messrs. Smith Thompson, Hendler, Wilson and Ridout.

Mr. JESSE H. WILSON having been sworn testified as follows:

By Mr. RIDOUT:

Q. You were advisor of Mr. Miller in reference to the purchase of this Payne interest? A. I was.

Q. I wish you would state what if any knowledge or notice you as his attorney had of the purpose of the other parties in interest in this real estate to assert any adverse claim against Mr. Miller at the time when the deeds that Mr. Miller joined in executing or either of them were executed? A. None whatever. I should like to state that when the first transaction was made the purchaser was a client of mine, the purchaser of the first piece of real estate, I examined the title for him which was not very many months after the death of Mrs. Payne. I was unwilling to advise him to take the title to the property on account of the unsettled condition of the estate of Mrs. Payne, unless the entire proceeding went into the hands of the executor, which was done and the deeds passed to the purchaser
77 from the heirs in connection with Mr. Miller. When the second piece of property was sold the purchaser went to one of the Title Companies which one, I do not know now, and I had nothing to do with the transaction until Mr. Miller called upon me in relation to bringing a suit for partition it appearing that the parties were not quite willing to pay commissions as I recall it, which the Miller Shoemaker Company charged for making the sale. Mr. Miller thought the price an excellent one and that the opportunity should not be lost. I told him that the parties all being of age that I thought perhaps I could bring about a settlement of the matter without the expense of a partition suit. On account of the commissions the relation of the parties had become somewhat strained and Mr. Miller seemed unwilling that any part of his share of the proceeds should go into the hands of Mr. Payne the executor and wanted to know if it could not be retained. I told him no, it would be impossible, and suggested as a solution of the matter that the entire proceeds be placed in the hands of Mr. Thompson and myself as attorneys to afford Mr. Miller full protection. It was really to straighten out this little tangle between Mr. Miller and the family. I knew nothing of any claim against the interest of Walter Payne. After the settlement had been made by the Title Company and the check drawn to Mr. Thompson and myself as attorneys, it
78 appeared that $100 had been left in the hands of the Miller Shoemaker Company, for which sum the Title Company had made no account. Mr. Thompson came at once to see me and asked me to get that money from the Company. It was then that he first broached the subject of this claim against Walter Payne's interest in the estate and I made the remark to Mr. Thompson, I thought it

was rather late in the day to bring up such a matter, after the deeds had all been signed and delivered. When I told Mr. Miller of this claim he was very much inclined to have the Company hold this $100 but I told him it was out of the question, that he was one person and the Company was an entirely different thing, and the money was paid over, I do not claim to be infal-ible, but this is my best recollection.

By Mr. HENDLER:

Q. In the sale of that first piece of property, you represented the purchaser? A. Yes.

Q. Did you draw the deed? A. I imagine I did.

Q. You said something about the purchaser of the second piece of property sold going to the Title Company you don't mean he went to the Title Company for the purchase? A. For an examination of the title.

Q. He purchased it from the Miller Shoemaker Company?
79 A. I think that is in evidence.

Q. Now your first letter to Mr. Thompson with regard to the sale of this property was written to him sometime in the early part of last summer, was it not, Mr. Wilson? A. I do not remember.

Q. You recall don't you that Mr. Thompson and I called to see you together? A. We had several calls I think.

Q. When we called, I mean the first time, when you were insisting upon the sale of this property at that price, you recall we called and asked to postpone the matter for some little time, don't you, saying that we were investigating the matter and would give you an answer as to whether the sale should be made, later on? A. Yes, I think that was incident to the partition suit.

Q. We told you that the executor himself had one or two offers for that property? A. Yes, but I recall that he did not have any offer that would equal the offer the Miller Shoemaker Company had.

Q. Don't you recall my telling you that he said to us he had an offer at the same figure. A. Yes but that afterwards went through, fell through.

80 Q. After that we told you that he told us that as his matter had fallen through, it would probably be just as well to let the property go for $3500 with commissions to the Miller Shoemaker Company? A. Yes.

Q. Don't you recall Mr. Wilson, that along in September when the matter of the proceeds of that sale going into the hands of yourself and Mr. Thompson as trustees was arranged, that we told you then, you were insisting on Mr. Miller's behalf, I think your statement was at his suggestion that you hold the proceeds of the sale in order to secure himself, we were insisting that the money properly belonged in the hands of the executor and that Walter Payne's right to a distributive share would be disputed? A. I think your statement is entirely correct except the latter part my recollection is not that any intimation was made by you of any dispute until after the settlement through the Title Company and demand had been made for the one or two hundred dollars which had been left with the Miller Shoemaker Company.

Q. Of course you state that as your honest opinion? A. Yes.
Q. Let us see if I can't refresh your recollection, don't you recall when we finally told you that, which was before the purchaser went to the Title Company, that we had been waiting for Mr.
81 Maedel to come home? A. I don't remember that.
Q. Now, don't you recall in that connection Mr. Wilson that we did tell you just exactly what we had found out at the Building Association and at Mr. Maedel's office in connection with this money, and we discussed the two sections of the Code? A. Yes, but it was after the settlement of the last sale. I remember where we were sitting, I was not in my private office, but in the middle room, Mr. Thompson told me about this claim, I expressed surprise and Mr. Thompson did not like what I said and he made the remark that he did not think it was incumbent upon him to disclose his client's hand until that time, I remember that very distinctly.

Mr. J. BARTON MILLER is recalled.

By Mr. WILSON:

Q. Had you any knowledge or information directly or indirectly of any claim against the share of Walter Payne in the estate of his mother at the time you executed and delivered the two deeds which have been testified about in this case? A. Absolutely none.

By Mr. HENDLER:

Q. Did you give direction to the Title Company as to the preparation of this second deed? A. No, I did not.
82 Q. Who did? A. Why it must have been the purchaser.

Mr. SMITH THOMPSON, JR. having been sworn testified as follows:

By Mr. HENDLER:

Q. You are the attorney for the executor in this case? A. Yes.
Q. Will you please state what was done after you received the letter from Mr. Wilson in regard to the sale of this piece of property, first let me ask you what was done about the proceeds of the first sale? A. Passed into my hands and from my hands into the hands of the executor.
Q. How did it come into your hands? A. As attorney for the executor.
Q. Was any demand made for it by you? A. No, except as soon as I got the money I immediately turned it over to the executor, knowing he should have it.
Q. How did it come into your hands, through what course did it come into your hands? A. I received it, I think I was in Mr. Wilson's office I think the purchaser was there and I received a certain amount of cash and he gave me a check payable to my order
83 as attorney for the executor, I think that was the way it occurred.
Q. In Mr. Wilson's office? A. Yes.
Q. Now Mr. Thompson go on and state what was done by you as attorney for the executor after you received that first letter from Mr.

Wilson in regard to the sale of the second piece of property? A. Well I not only represented the executor, but I represented the other heirs and it was my aim to save the estate the expense of a partition proceeding which I think Mr. Wilson's letter indicated was the wishes or desire of his client Mr. Miller. I think I communicated the whole thing to all of the heirs and we then decided that they would accept the offer that had been made through the Miller Shoemaker Company of $3500 which would obviate the partition proceeding.

Q. I want to know just what was done in regard to this indebtedness of Walter Payne? A. Well, I can say that from almost from the time when the estate came into my hands I began to look into this question of Walter Payne, of what his share in the estate was. We had gone to the Building Association and found the checks which have been produced in evidence here and we were confident that he had no interest to sell. Until that time up to the time we had concluded that, we did not say anything to Mr. Wilson
84 about disputing his claim, but when the sale of the last piece of property was made and before any proceeds was paid over in any shape, manner or form Mr. Hendler and myself called on Mr. Wilson and then and there told him that we disputed Mr. Miller's claim. We also told him exactly what our defence was, that we had these checks endorsed by Walter W. Payne along the line of indebtedness to the estate, and we also discussed with Mr. Wilson the question whether it would not take in the question of an advance under the Code, all of which we discussed thoroughly. It was at that time when we told Mr. Wilson of this dispute that it was agreed between Mr. Wilson, Mr. Hendler and myself that we should hold this money. Up to that time the proceeds had not been paid over. We agreed then that we would do that. Subsequent to that Mr. Wilson received the check payable to our joint order, and I went to his office and I endorsed it, I think Mr. Wilson deposited it. It was for that reason that Mr. Wilson and I took this money on account of the dispute that arose then in regard to Mr. Miller's claim, it was not for any other purpose because no other question had arisen. The question of commissions referred to by Mr. Wilson was eliminated when I informed him that the heirs had agreed to accept the $3500 which included the question of commissions to the Miller Shoemaker Company. That is my best recollection of just exactly what took place.

85 Q. Do you recall the reason for asking Mr. Wilson to hold off for a time before you notified him finally as to the sale. A. The letters will disclose that. I think I said the heirs were scattered and I would have to confer with them, I think that is the substance of the letters.

By Mr. WILSON:

Q. Do you recall my making a remark to you, that I considered it not very good treatment that you should have kept this matter back from me until after the deeds had been delivered and the transaction closed, and you made the remark that you did not think it necessary

to disclose your client's hand? A. I remember that very distinctly, but it arose in this way.

Q. Don't you recall that the question at that time arose in your endeavor to get the $200 deposit from the Miller Shoemaker Company, when I made that remark to you you disclosed this claim. A. No. Not at all, they were two separate and distinct matters.

Mr. CHARLES T. HENDLER having been sworn made the following statement:

Mr. Thompson asked me to assist him in this matter some time during the summer, and we went to two building associations,
86-90 first and looked up checks, we went to the Georgetown Building Association and saw Mr. King and Mr. King turned us over to Mr. Miller, and Mr. Miller himself gave us these checks.

Now Mr. Maedel as it developed in the first hearing of the case deposited the money from the loan made by the other building association. He was out of the city and that was the reason for postponing a definite answer to Mr. Wilson. Mr. Maedel did not get back until late in September and as soon as Mr. Maedel did get back and we could get at his record disclosing that first proposition, Mr. Thompson and I visited Mr. Wilson's office and the matter was discussed there and arrangements entered into, it was before the money passed in the case of the second sale, that we told Mr. Wilson that Walter Payne's right to a distributive share would be disputed because of his indebtedness to the estate, and we discussed two sections of the code, I was present then and Mr. Wilson was in his back office and that was before the money passed.

Mr. JOHN E. PAYNE is recalled.

Q. State why it was that the inventory was delayed in being filed? A. On account of my having fallen on the ice and breaking my leg on the 10th of December. I had until the 20th of December, but I was delayed on account on *on* that account.

Adjourned.

91 Mr. RIDOUT: On behalf of the respondent Miller objection is made to the allowance of any fee to these gentlemen as against the share of said Miller on familiar practice. So far as the claim may be set up as against the other distributees of the fund, counsel for Miller have no right and do not object to conceding that the laborer is worthy of his hire.

Adjourned.

(Endorsement: Auditor's Report. Filed Mar. 31 1906. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

92 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In re Estate of PRISCILLA R. PAYNE, Deceased. No. 12371, Adm.

Exceptions of J. Barton Miller to the Report of the Auditor.

The said Miller excepts to said report on the following grounds:

Because the said Auditor erred as follows:

1. In finding that in the lifetime of the said deceased, she made advancements to her son, Walter W. Payne, to the amount of $2588.75.

2. In finding that during the life time of said deceased she notified her said son of her claim that she had made such advancements.

3. In holding that the interest of said Walter W. Payne as devisee under his mother's will was subject to any lien or deduction in repect of said supposed advancement.

4. In holding that the said Miller who acquired his interest in November 1904, was charged with notice of an inventory not filed until March 21, 1905.

5. In holding that the said Miller by reason of his being Secretary of a Building Association through whom the said deceased had obtained a loan, was by reason of his office, charged with notice that the endorsement of Walter W. Payne appeared on checks

93 issued by the said Building Association to said deceased, and thereby charged with notice that advancements had been made by said deceased to her said son.

6. In holding that said Miller was bound before purchasing the interest of said Payne to inquire whether he had been advanced by his deceased mother in her life time.

7. In holding that said Miller was guilty of laches in ascertaining whether said Walter W. Payne was indebted to his mother's estate before purchasing the interest of said Payne in his said mother's real estate.

8. In holding that said Miller had notice before he purchased said son's interest in his mother's real estate that he was indebted to her.

9. In holding that because of said supposed advancements, the said Miller was not entitled to share in the proceeds of sale of the real estate of said deceased.

10. In holding that the will of said deceased operated a conversion of the realty of said deceased into personalty, at a time prior to the conveyance by said Walter W. Payne to said Miller.

11. In refusing to hold that by the sale of said real estate by the devisees of said deceased, the character of the realty was restored to the property so sold.

12. In excluding said Miller from participation in the proceeds of the sale of said real estate.

13. In holding that the executor and the other devisees of said deceased were not estopped to assert as against said Miller the con-

tention that the interest acquired by him from Walter W.
94 Payne was extinguished by said supposed advancements.

14. In holding that the doctrine of advancements is applicable to cases where the deceased dies testate.

15. In admitting evidence of transactions between the adverse parties in this cause and the deceased which took place out of the presence of Walter W. Payne and of said Miller.

16. In charging upon the whole fund the fee allowed Counsel for opposing parties, instead of charging the said fee wholly upon the shares of such opposing parties.

Wherefore this exceptant prays that the said report of the said Auditor may be corrected in respect of the errors hereinbefore set forth.

JESSE H. WILSON,
JESSE H. WILSON, JR.,
JOHN RIDOUT,
Att'ys for Exceptant.

(Endorsement: Exceptions to Report of Auditor. Filed Apr. 4, 1906. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

95 In the Supreme Court of the District of Columbia, Holding a Probate Court.

In re Estate of PRISCILLA R. PAYNE, Deceased. Adm., No. 12371.

This cause coming on to be heard on the exceptions to the report of the Auditor filed herein, after hearing counsel on both sides and after consideration by the Court,

It is this 20th day of April, A. D. 1906, adjudged and ordered that the said exceptions be, and they hereby are, overruled, and the said report confirmed.

By the Court:

WENDELL P. STAFFORD,
Associate Justice.

Appeal noted in open Court by J. Barton Miller and bond for costs fixed at one hundred dollars ($100).

WENDELL P. STAFFORD, *Justice.*

(Endorsement: Order overruling exceptions and confirming Auditor's report. Filed Apr. 20, 1906. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

96–101 Supreme Court of the District of Columbia, Holding a Probate Court.

No. 12371, Administration.

J. BARTON MILLER, Plaintiff,
vs.
JOHN E. PAYNE, Executor; LORRAINE E. HOLDER, HARRY S. PAYNE, LILLIE P. MERRILL, JOHN E. PAYNE, Defendants.

Know all Men by these Presents, That we J. Barton Miller of the District of Columbia, principal, and Isaac E. Shoemaker surety, are held and firmly bound unto the above-named John E. Payne, Executor, Lorraine E. Holder, Harry S. Payne, Lillie P. Merrill and John E. Payne in the full sum of one hundred ($100.00) dollars, to be paid to the said John E. Payne, Executor, Lorraine E. Holder, Harry S. Payne, Lillie P. Merrill and John E. Payne, their executors, administrators, successors or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals, and dated this fourth day of May, in the year of our Lord one thousand nine hundred and six.

Whereas the above-named J. Barton Miller has prosecuted an appeal to the Court of Appeals of the District of Columbia, to reverse the Decree rendered in the above suit by the said Supreme Court of the District of Columbia on the 20th day of April, 1906.

Now, therefore, the condition of this obligation is such, That if the above-named J. Barton Miller shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue in law.

J. BARTON MILLER. [SEAL.]
ISAAC E. SHOEMAKER. [SEAL.]

Signed, sealed and delivered in the presence of—
G. D. MILLER.

Approved the 11th day of May, 1906.

WENDELL P. STAFFORD,
Justice, S. C. D. C.

(Endorsement: Bond for Appeal to Court of Appeals. Filed May 11, 1906. James Tanner, Register of Wills, D. C., Clerk of Probate Court.)

* * * * * * *

102 Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

I, James Tanner, Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify the foregoing pages, numbered from 1 to 101, inclusive, to be true copies of the originals of certain papers on file in the office of the Register of Wills, Clerk of the Probate Court, in case No. 12,371 estate of Priscilla R. Payne deceased, wherein J. Barton Miller is appellant, and John E. Payne, Executor, Lorraine E. Holder, Harry S. Payne, Lillie P. Merrill and John E. Payne are appellees, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the request of counsel filed therein and made a part hereof.

I further certify, that the bond for appeal, in the penalty of One Hundred dollars, was duly filed by said appellant, and approved by said Court on the 11th day of May, A. D. 1906.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Probate Court, this 4th day of June, A. D. 1906.

[Seal Supreme Court of the District of Columbia, Probate Jurisdiction.]

JAMES TANNER,
Register of Wills for the District of Columbia,
Clerk of the Probate Court.

103 In the Supreme Court of the District of Columbia.

No. 1682.

J. BARTON MILLER
vs.
JOHN E. PAYNE ET AL.

Designation under Rule 6, Section 5.

The Clerk will cause to be printed, the following portions of the record:

All pages 1, 6, 7, 8, 10, 21, 30 to 37, both inclusive, 41, 43 to 86, both inclusive; the last ten lines of page 91.

All pages 92, 93, 94, 95, 96. All page 102.

Please omit:

Pages 2 to 5, both inclusive; pages 9, 11 to 20, both inclusive, 22 to 29, both inclusive, 38, 39 and 40, 42, 87, 88, 89, 90, all except the last ten lines of 91, 97 to 101, both inclusive.

JESSE H. WILSON,
JESSE H. WILSON, JR.,
JOHN RIDOUT,
Attorneys for Appellant.

Messrs. Thompson & Hendler, Attorneys for Appellees.

GENTLEMEN: Please take notice that the foregoing specification for printing record has this day been filed.

JESSE H. WILSON,
JESSE H. WILSON, JR.,
JOHN RIDOUT,
Attorneys for Appellant.

(Endorsed:) No. 1682. J. Barton Miller *v.* Jno. E. Payne, *et al.* Designation for printing. Court of Appeals, District of Columbia. Filed Jun- 18 1906. Henry W. Hodges, Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1682. J. Barton Miller, appellant, *vs.* John E. Payne *et al.* Court of Appeals, District of Columbia. Filed Jun- 11, 1906. Henry W. Hodges, clerk.

IN THE

Court of Appeals of the District of Columbia

J. BARTON MILLER,
Appellant,
vs.
JOHN E. PAYNE,
Executor, et al.

No. 1682.
October Term,
1906.

BRIEF FOR APPELLANT.

JESSE H. WILSON,
JESSE H. WILSON, JR.,
JOHN RIDOUT,
For Appellant.

IN THE

Court of Appeals of the District of Columbia

J. BARTON MILLER,
Appellant,
vs.
JOHN E. PAYNE,
Executor, et al.

No. 1682.
October Term,
1906.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The deceased published her will September 6, 1894.

She owned two parcels of real estate, and left five children.

Testatrix died in 1904.

She devised to her five children the proceeds of the sale of her real estate.

Miller purchased from Walter W. Payne and obtained a deed from him and wife dated November 26, 1904, and recorded December 1, 1904, Liber 2850, Folio 400.

It is claimed by the executor that after publication of the will, the testatrix loaned to Walter W. Payne, one of her sons, $2,700; that the will operated a conversion; that this loan is to be treated as an advancement of personalty

and thus an ademption of the legacy, or if not, then as a loan which should set off against Walter W. Payne's legacy and that the advancement or set off can and should be given effect against a purchaser from Walter W. Payne after his mother's death, although said purchaser had no notice of these claims when he purchased and paid the purchase money.

ASSIGNMENTS OF ERROR.

The Court below erred:

1. In overruling each of the exceptions of the appellant to the report of the Auditor, which exceptions are set forth on pages 28 and 29 of the Record are hereby referred to and are made part of this assignment of error as fully and to the same extent as if each of said exceptions was herein repeated at length.

2. In confirming the said report of the Auditor.

ARGUMENT.

If the contentions of appellees or either of them can be maintained, the whole doctrine concerning purchases from devisees will be upset and the practice in respect of title examinations in such cases, which has obtained since the cession of the District, will be revolutionized.

On behalf of appellant it is contended:

a. That there was no conversion.

b. That there was no advancement.

c. That there was no ademption.

d. That if these were loans by the deceased to Walter W. Payne, they created debts from him to her to be collected like other debts.

e. That even if such debts could be set off as against Walter Payne, they could not be against his transferee by

deed executed and recorded prior to any claim of such indebtedness.

f. That a purchaser from a devisee under such a will as is in question here, is not bound to inquire whether the devisee is indebted to the estate or has been advanced.

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a. The will does not operate a conversion.

Clark *vs.* Hamilton, 3 Mackey, 428.

b. But even if the will did effect an equitable conversion, it is clearly within the power of the beneficiaries to reconvert, and this they did, for, instead of allowing the executor to sell, they themselves sold.

Craig *vs.* Leslie, 3 Wheat, 563.

Reconversion is that imaginary process by which a prior constructive conversion is annulled and the converted property restored in contemplation of equity to its original state.

1 A. &. E., Vol. VII, page 480.

b. There was no advancement either of realty or personalty because the doctrine of advancement can only be invoked in cases of intestacy.

This is settled by cases to be cited, must be so on principle, was so prior to the Code, and is so affirmatively provided in sections 379 and 959.

1 A. & E., 761, Stewart *vs.* Pattison, 8 Gill, 46.

c. "There was no ademption"—Sec. 1630 of the Code, is unfortunately inaccurate in speaking of a satisfaction of a legacy because the term *ex vi termini* imports an obligation on the part of a testator of which he can only relieve himself with the assent of the other party, so that the statutory provision would be void if construed according to its letter.

What is really sought to be accomplished by Sec. 1630 is to apply the well known doctrine of ademption to all legatees, where competent proof shows such was the intention of the testator.

Here a question arises whether this will, having been published before the Code went into operation, its interpretation can be controlled by it. We insist that it cannot be, but assuming for the purpose of this argument without admitting that it can be so controlled, let us see whether in this case we have the essential elements of an ademption.

Ademption by portions occurs when a testator, standing in *loco parentis*, makes a gift to his legatee of a certain and substantial amount, substantially identical in kind with a prior bequest without direction in the testament.

1 A. & E., 613.

The expression in *loco parentis* ought really to be in *loco patris*, because the doctrine is never applied except where the testator owed a legal duty to provide for the legatee.

A mother is not within the rule.

1 Am. & Eng., page 615.

Bennett *vs.* Bennett, L. R. 10 Chy. Div., 474.

In this case the competent proof is clear that there was no gift.

If it shows anything, it shows loans.

The devise is uncertain, being of a residue.

Davis *vs.* Whitaker, 38 Ark., 449.

Roper on legacies, 377.

It is not *ejusdem generis*.

We must test this question of identity by what the testatrix knew.

She did not foresee that technical lawyers would talk about conversion in respect of her will. She understood that she had devised an interest in the real estate to her son, Walter, and so she had, for a devise of the proceeds of land is a devise of the land.

Clark *vs.* Hamilton, *Supra.*

If she loaned her son any money, she understood thereby that he became her debtor.

As will be hereafter shown, there is no proof even that she loaned him money.

There is surely no proof that she adeemed, not only for lack of all the requisites, but because there is no competent proof of any intention to advance.

Her alleged loose declarations made long after the acts are not competent.

Harley *vs.* Harley, 57 Md., 340.

This case is conclusive, and if Graves *vs.* Spedden, which appellees will quote, were in point, which it is not, Harley *vs.* Harley overrules it and is in every respect a better reasoned case.

These declarations are also inadmissible, being rank hearsay.

The learned counsel for the executor, feeling the force of this, ingeniously, but not ingenuously, practically concede that they must contend and establish that if Walter was indebted to his mother when she died, that debt was a prior lien upon his interest under her will and paramount to a conveyance by him, and they attempt to base this contention upon the law of set off.

Set off relates to mutual debts, it is true, but the fact of the existence of a debt from plaintiff to defendant was no defense to an action by the plaintiff prior to the statutes of set off, and could not be availed of as a defense since such statutes unless pleaded.

U. S. *vs.* ~~E. R. Ford~~ Ford, 6 Wall., 488.
25 A. & E., 489.

It appears in this case that the first intimation of any claim of an indebtedness from Walter was when the executor filed his inventory of debts, which was in March, 1905.

By that paper the representatives of these objectors, acting for them, elected to treat these claims as loans and cannot now be heard to claim otherwise.

P. W. and B. R. R. *vs.* Howard, 13 Howard, 337.
Davis *vs.* Wakelee, 156 U. S., 680.

When one purchases from a devisee, he is only bound to ascertain whether the personalty is sufficient to pay the debts of the testator.

He is not bound to inquire whether the devisee is indebted to the estate or has received advancements.

Gibson *vs.* McCormick, 10 G. & J., 65.

This is peculiarly true in this case.

The executor waited nearly a year before he disclosed on the record any purpose to assert any claim against Walter.

He might have sued him, and ought to have done so, if he thought he could prove his case, which the attempted proof, as shown in the Record, shows he could not have done.

He encouraged Miller to permit payment of proceeds of sale into the executor's hands and into certain trustee's hands and gave no hint of his purpose, and he and the others for whom he acts, having thus lulled Miller into security and led him to irrevocably change his status and part with the potent weapon of record, title by deed, now spring these inconsistent claims of ademption and set off and attempt to deprive him of his rights as a *bona fide* purchaser for value, without notice.

This course of conduct does not meet with favor in an

Equity Court. As was so well said by the Court of Appeals in the case of Dangerfield *vs.* Williams, 26 D. C. Appeals, 508.

> "These appellants having remained silent when they should have spoken, ought not now to be allowed to speak when they should remain silent."

If the executor's contention that a purchaser from a devisee is bound at his peril to ascertain the condition of accounts as between the devisee and the testator's estate and *inter sese,* the devisees, be established, a great step backward will be taken in the alienation of real estate.

Severe dormant encumbrances will be created and sale of individual interests will be rendered practically impossible, because under such contention a mere statement by a hostile executor or devisee, that the devisee vendor was indebted to the estate or had been adeemed, would effectually defeat the sale.

Indeed, it is confidently submitted that the Court will take judicial notice that the contrary practice to that contended for by the executor has become a rule of property which ought not to be retroactively disturbed. Besides, the rule contended for by appellant works no hardship and respects all rights and is founded in fairness.

If this executor had promptly brought suit and promptly made claim of Record, this situation could have been avoided. If he had warned Miller, when he was persuading him to let the executor and the trustee hold the proceeds of sale, that after Miller had parted with them, this previously wholly unasserted claim would be set up, Miller would never had so radically changed his status.

Equitable remedies are for the vigilant.

That jurisdiction to decide the questions herein, notably that of conversion of realty or not is exclusively in equity, is to plain for argument, but appellant concedes that

if his consent could confer jurisdiction on the Probate Court he has done so.

Upon the whole we submit that the decree below was erroneous and should be reversed.

JESSE H. WILSON,
JESSE H. WILSON, JR.,
JOHN RIDOUT,
For Appellant.

In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1906

Brief on Behalf of Appellees

CHARLES F. BENDLER
[illegible] THOMPSON, JR.

In the Court of Appeals of the District of Columbia

October Term, 1906.

J. BARTON MILLER,
Appellant,
vs.
JOHN E. PAYNE,
Executor, et al.

No. 1682.
No. 5, Special Calendar.

BRIEF ON BEHALF OF APPELLEES

Statement of Facts

The statement of facts by counsel for appellant is so meager and misleading that we have felt it was due to the Court to have before it in succinct form all of the essential facts in the case which the Auditor had before him when his report was made.

This is an appeal from an order passed in the Probate Court overruling exceptions filed to a report of the Auditor and confirming said report.

Mrs. Priscilla R. Payne, the testatrix, died on the 25th day of July, 1904. (Record, p. 2.) Her will is dated September 6, 1894, (Record, p. 1).

The account of the Executor was filed on November 13, 1905, and on the same day the order of reference was passed. This order of reference was *consented to in writing* by the attorney for the appellant. (Record, p. 4.)

Some time in 1898 Walter W. Payne asked Mr. Wells to get $1,000 for him (Payne) through the American Security and Trust Company on some property of his (Payne's) mother in Georgetown, to be used to purchase a half interest for Walter W. Payne in a hotel at Upper Marlboro. The money was borrowed from the American Security and Trust Company, and was either turned over to Walter W. Payne or for him to the owner of the hotel. (Evidence of C. A. M. Wells, Record, pp. 9-10.)

The Lawyers' Title Company distributed the proceeds of the loan made on Priscilla R. Payne's property by the American Security and Trust Company. The total amount of the loan was $1,100. The balance, after deducting expenses and commissions, amounting to $1,031.30, was distributed by check No. 166 of the Lawyers' Title Company, dated October 11, 1898, to Priscilla R. Payne, which was by her indorsed over to C. A. M. Wells. (Evidence of Harry M. Packard, Record, p. 11.)

The loan of the American Security and Trust Company was paid off by a loan of $1,500 made on June 1, 1902, by the Washington Six Per Cent Permanent Building Association. The Building Association issued its check, No. 9793, dated June 1, 1902, to Priscilla R. Payne. The check was indorsed by her and by Julius A. Maedel. (Evidence of Henry H. Bergman, Record, p. 10.)

Mr. Maedel distributed the proceeds of the check for $1,500. Of this amount $1,133 was used to pay off the trust of the American Security and Trust Company. For the balance, $342.25, Mr. Maedel gave his check, No. 1052,

payable to the order of Priscilla R. Payne. That check was indorsed by Priscilla R. Payne, and below her indorsement by Walter W. Payne. (Evidence of Julius A. Maedel, Record, pp. 10-11.)

The decedent afterward borrowed from the Washington Six Per Cent. Permanent Building Association for Walter W. Payne $300 in addition to the $1,500. The check of the Association, No. 9887, dated July 23, 1903, for $197.50 to the order of Priscilla R. Payne, was indorsed by her, and after her by Walter W. Payne. Check No. 10205 of the association, dated December 15, 1903, for $100, was indorsed by Priscilla R. Payne and Walter W. Payne. (Evidence of Henry H. Bergman, Record, p. 10.)

This documentary evidence proves that this money borrowed by the testatrix, amounting to $1,797.50, was by her turned over to Walter W. Payne for his own use.

From the First Co-Operative Building Association of Georgetown the testatrix borrowed different sums for Walter W. Payne. Check No. 13051 of the association, to the order of Priscilla R. Payne, dated November 18, 1903, for $250, was indorsed by Priscilla R. Payne and Walter W. Payne. Check of the association No. 13089, dated December 2, 1903, to the order of Priscilla R. Payne, for $97.50, was indorsed by Priscilla R. Payne and Walter W. Payne. Check of the association No. 13365, dated April 25, 1904, for $197.50, to the order of Priscilla R. Payne, was indorsed by Priscilla R. Payne and Walter W. Payne. Check No. 13400 of the association to the order of Priscilla R. Payne, dated May 9, 1904, for $100, was indorsed by Priscilla R. Payne and Walter W. Payne. All of these checks of the association were drawn by A. B. Jackson, President, and J. Barton Miller, Secretary. (Evidence of George W. King, Record, pp. 12-13.)

So that of the moneys borrowed from the First Co-Operative Association there was turned over to Walter W. Payne at least the sum of $645.

Therefore, the amount of money Walter W. Payne had from his mother, the testatrix, during her lifetime and *after the making of her will* is at least $2,442.50.

Testatrix told John E. Payne, her son, that she had loaned Walter W. Payne money to go into business. (Evidence of John E. Payne, Record, p. 13.)

Testatrix told Harry E. Payne on several occasions that if any of the children got any money from her it would be deducted from their share at her death. J. Barton Miller (the appellant) told Harry E. Payne, on two occasions, that "the money was all gotten for Walter." (Evidence of Harry E. Payne, Record, pp. 13-14.)

Mrs. Lilly P. Merrill heard the testatrix, her mother, say a number of times that if any advances had been made to any of the children it would come out of their share at her death. (Evidence, Record, p. 15.)

Testatrix told her daughter, Mrs. Holder, at the time the loan was being made, about loaning money to Walter to go into the hotel business, and that "Walter understands that whatever he gets during my life time will be deducted from his share at my death." Testatrix told Mrs. Holder of borrowing money for Walter in November, 1903. In May, 1904, testatrix told Mrs. Holder that she had just returned from the Building Association, where she had been to borrow some money for Walter. (Evidence of Mrs. Lorraine P. Holder, Record, pp. 15-16.)

Testatrix told Mr. Raub of borrowing money for Walter W. Payne. Testatrix told him a number of times that she intended her children to all share alike. She told Mr. Raub she had advanced Walter quite a good deal of money, and

that "if he had received more than he ought to have that he should return it to the estate, that they were all to share alike." Walter W. Payne himself told witness that the testatrix had loaned him money. (Evidence of Ezra W. Raub, Record, pp. 16-17.)

J. Barton Miller, the appellant, is Secretary of First Co-Operative Building Association of Georgetown. Some time after the death of testatrix Walter W. Payne came to him with an offer to sell his share in his mother's estate. Miller offered Payne $200 for his share. Miller's only investigation was to see if Walter W. Payne had conveyed his interest to any one else. Miller did not know the provisions of Mrs. Payne's will, except as told him by Walter Payne, and he made no investigation in regard thereto. Miller did know that at least a part of the money borrowed by the testatrix from the Building Association, of which he is secretary, was for Walter W. Payne. This latter fact is shown by the entry in Miller's own handwriting in the pass-book. (Record, p. 20). Miller insisted on the sale of the second piece of property under a threat of filing a suit in equity for partition. This was before the close of the administrative year. Miller never investigated to find out the condition of the estate and particularly of Walter W. Payne's interest, if any, in the estate. Miller did not know that an inventory had been filed in the Probate Court charging Walter W. Payne with over $2,500 due the estate. In fact, Miller made no investigation at all as to whether Walter W. Payne was entitled to anything from the estate or not, except the mere fact that he inquired as to whether Payne had made any other transfer of his share. While negotiating with Walter Payne he did not inquire of the executor or any of the beneficiaries. (Evidence of J. Barton Miller, Record, pp. 18-22.)

The inventory of debts due to the deceased, filed March

shows Walter W. Payne charged with $2,588.75. (Record, p. 3.)

Mr. Wilson, attorney for appellant, was notified by Messrs. Thompson and Hendler, attorneys for appellees, before the sale of the last piece of property was consummated that Walter W. Payne's right to a distributive share would be disputed because of his indebtedness to the estate. (Evidence of Smith Thompson, Jr., and Charles T. Hendler, Record, pp. 25, 27.)

Argument

At the outset it may be well to call attention to the fact that, unless counsel for appellant can demonstrate that he acquired title to a devise of real estate and not an assignment of personal property, their entire case falls to the ground. If this will effected an equitable conversion, then any so-called doctrines relating to purchases from devisees plays no part here.

The will of the testatrix contains an unmistakable direction to sell her real estate.

> "The authorities are quite well agreed that such express direction of sale, though the time of sale is not immediate, operates to convert the property into personalty from the death of the testator."
>
> Iglehart v. Iglehart, 26 Ap. D. C., 209, 217.
> Reiff v. Strite, 54 Md., 298.
> Keller v. Harper, 64 Md., 74, 82.
> Stake v. Mobley (Md.), 62 Atl. Rep., 963.
> Hope v. Brewer, 136 N. Y., 126.

Authorities on this subject might be multiplied, but we

content ourselves with the latest expressions of opinion by this Court in the Iglehart case and the Court of Appeals of Maryland in the case of Stake v. Mobley.

Therefore, the money in the hands of the Executor in this case must be treated as having been personal property from the date of the death of the testatrix.

It is contended that the will does not operate a conversion. In support of this Hamilton v. Clark, 3 Mack., 428, and Craig v. Leslie, 3 Wheat., 563, are cited.

In the case of Hamilton v. Clark the only question decided was as to the right of a surviving executor to sell. The whole question considered was simply one of expediency.

The case of Craig v. Leslie will be found to support our contention as to an equitable conversion in this case.

Counsel for appellant assert in all seriousness that the testatrix intended to devise land to her son Walter. This assertion is without warrant. There is no evidence of such an intention. Her will plainly and clearly negatives the proposition. She unmistakably referred to a division of money, and not real estate. The only "proceeds" of a *sale* of the real estate could be money, and that is what she directed in her will to be "divided equally."

The direction for a sale of the real estate is in this will so clear and positive—even fixing the time when the sale is to take place—that there can be no question that the rule of law as to equitable conversion applies. This is such an elementary proposition that it will not be further discussed.

But counsel for appellant assert that, even if there was an equitable conversion, a reconversion was effected by the sale of this property.

If examined it will be found that in the doctrine of recon-

version there is nothing at all to support the contention of appellant's learned counsel.

To effect a reconversion there must be some positive act or expression to show that it was the desire and intent to effect a reconversion. (Craig v. Leslie, supra.)

In other words, there must be an election. And in such case election contemplates a beneficial ownership of the land as land, not money—that is, that the property must remain in *statu quo*.

> "Election is the expression of the intention on the part of the beneficiary to take the constructively converted property in its actual quality." (7 Am. and Eng. Cycl. Law, 2d ed., 480.)
>
> "Election is where the land is taken by the owner of the proceeds." (Shallenberger v. Ashworth, 25 Pa. St. 152, 154.)

The fact is that the real estate company of which the appellant is the secretary effected the sales of both pieces of real estate. The proceeds of the first sale were turned over to the Executor. When the second sale was effected and before the execution of the deed appellant's counsel was informed as to the fact that his right to any of the money would be disputed. It was because of that fact that the proceeds were turned over to Messrs. Wilson and Thompson as trustees for all parties.

It cannot by any possibility be held that, merely because those beneficially entitled, in order to satisfy the requirements of a purchaser, joined in signing a deed, appellees elected to reconvert this property into real estate. We have seen that it requires some positive act on their part in order to establish an intention to elect to take the land as land.

Sections 379 and 959 of the Code provide for advancements in case of intestacy. Section 1630 is as follows:

> "A provision for or *advancement* to any person shall be deemed a satisfaction, in whole or in part of a devise or bequest to such person contained in a *previous will* if it would be so deemed in case the devisee or legatee were the child of the testator; and, whether he be a child or not, it shall be deemed in all cases *in which it shall appear from parol or other evidence to be so intended.*"

The intention of the testatrix is fully proved in this case by her declarations. This is the sort of parol proof that is contemplated by section 1630 of the Code. These declarations are part of the *res gestae,* and particularly those declarations about which Mrs. Holder testifies.

Both antecedent and subsequent declarations may form part of the *res gestae.* It is not essential that they should be exactly contemporaneous with the principal transaction.

Graves v. Spedden, 46 Md., 527, 536.
Dilley v. ~~Lowe~~, 61 Md., 603, 611.

In the case of Graves v. Spedden (supra), which is a well-considered case in which the Court discusses many of the points involved in the case at bar, it was held that—

> "A gift of money or property by a parent to a child is presumptively an advancement, but this presumption may be rebutted by evidence proper for the purpose. In other words, whether such a gift takes the character and legal properties of an advancement or those of a full and absolute gift without a view to a portion or settlement depends on the intention of the donor, and that intention may be ascertained by parol evidence of the donor's declarations at the time of executing the con-

> veyance or making the gift, or of the donor's admissions afterwards; or by proof of facts and circumstances from which the intention may be inferred." (Page 533.)

It is asserted by counsel for appellant that the declarations of the testatrix were inadmissible, in support of which proposition they cite the case of Harley v. Harley, 57 Md., 340, and insist that it overrules Graves v. Spedden (supra).

As with all other cases cited by the learned counsel for appellant, the case of Harley v. Harley is not in point. In that case notes were given, and it was sought to use some uncertain declarations of the testator made long after the transactions. In the case at bar no tangible evidence of indebtedness exists, and the declarations of the testatrix are so close to the incidents as to be a part of the *res gestae*.

The case of Harley v. Harley does not overrule the case of Graves v. Spedden. Upon reading and comparing Harley v. Harley, Graves v. Spedden, and Dilley v. Lowe (cited *supra*) it will be found that the three cases are harmonious, and that they are conclusive as to our right to give in evidence the declarations of the testatrix. However, we are not compelled to rely on her declarations. We have in evidence the declarations of Walter W. Payne himself to the witness Raub.

The documentary evidence and the admissions of Walter W. Payne clearly prove the advancement in this case. The policy of the law always has been to equalize the portions of children.

> "As between a loan, a gift, and an advancement, the presumption is in favor of an advancement, because of its tendency to equalize. Thus if the amount in question is substantial, the presumption in most States is that it was intended as an advancement, but this is not

universally recognized. Where a father pays a child's debt without taking a note or security therefor, or advances him money for that purpose, or buys land in the name of, or makes a voluntary conveyance of land to the child, it will be held, in the absence of contravening evidence, an advancement." 2 Woerner's Am. Law of Adm., 2d ed., sec. 555.

"Where a father advances money and has the title taken in the name of his son, the presumption is that it is an advancement to the son out of his estate; and it is almost impossible to overcome that presumption." (Nailor v. Nailor, 5 Mack., 93, 104.)

See also Patterson's appeal, 128 Pa. St., 269.
Dilley v. Love, 61 Md., 603, 612 (*supra*).
Harper v. Harper, 92 N. C., 300.
Kintz v. Friday, 4 Dem., 540, 543.
Storey's Appeal, 83 Pa. St., 89, 97.
Holliday v. Wingfield, 59 Ga., 206, 208.
Proseus v. McIntyre, 5 Barb., 424, 432.

If a parent pays a debt for a child without taking security therefor the presumption is that it was an advancement.

Johnson v. Hoyle, 3 Head (Tenn.), 56.
West v. Beck, 95 Iowa, 520.

If a parent advances money to a son to pay a debt it is presumed an advancement.

Blockley v. Blockley, L. R. 29 Ch. D., 250.

If a parent signs a note as surety with the understanding that, if compelled to pay, it should be deducted from the child's share, it is an advancement.

Estate of Pickenbrock, 102 Iowa, 81.

If there ever was a case in which the law would presume

an advancement, it is in the case at bar. In this case one of five children obtained about half of the testatrix's estate during her life and after she had made her will. This, too, remains unexplained by any evidence offered, except the repeatedly declared intention of the testatrix that that child would have to equalize at her death.

Counsel for appellant seek to make a point of the fact that the doctrine of "advancement" (so called) applies only in case of intestacy. They lose sight of the fact that section 1630 of the Code provides for *"advancements"* in cases of testacy where the will was made prior to such advancements.

In any event our friends are merely splitting hairs any how. It can make no difference in the disposition of this case whether the large amount of money advanced to Walter W. Payne by his mother be called an advancement, an ademption, or a debt. The result must inevitably be the same.

If a parent, or other person in *loco parentis,* bequeaths a legacy to a child or grandchild, and after, in his lifetime, advances a portion to, or makes a provision for the same child or grandchild on his marriage or upon his going into business, such portion or provision will be deemed a satisfaction or an ademption of the legacy either in full or *pro tanto,* according as it is equal to or less than the legacy.

2 Woerner's Am. Law of Adm., 2d ed., sec. 448.
Williams on Executors, [1333].
Langdon v. Astor's Ex., 16 N. Y., 9, 34.
Richards v. Humphreys, 15 Peck. (Mass.), 133, 136.
Weston v. Johnson, 48 Ind., 1, 4.
Wallace v. Du Bois, 65 Md., 153, 159.
Jones v. Mason (Va.), 16 Am. Dec., 761.
Gilchrist v. Stevenson, 9 Barb., 9, 16.

Learned counsel for appellant seek to make it appear that,

in order to make operative the rule of law as to ademption of legacies, it was necessary for appellees to prove the testatrix's intention. This is not and never was the law. On the contrary, such advances as in the case at bar are presumed to have been on account of the child's portion unless a contrary intent on the testator's part is proven. There was absolutely no evidence of a contrary intent. However, there is abundant proof showing that the testatrix so intended the advances.

The doctrine of ademption as set out in section 1630 of the Code is simply declaratory of what always has been the law as to parent and child. Therefore, it can make no difference that this will was executed before the Code went into effect. In the case of Wallace v. DuBois, *supra,* the Court, at page 159, said:

> "The law in regard to the ademption of legacies is quite well settled, and the only difficulty lies in its application to the facts of each particular case. Where a father gives a legacy to a child without stating any particular purpose for which it is given, the legacy is in itself regarded as a portion of the estate intended for such child. And if the testator afterwards makes an advancement to such child on his marriage or upon going into business, the money thus advanced will be presumed to be in payment or satisfaction of the legacy either *pro tanto* or in full, as the money advanced may be equal to or less than the legacy. This presumption is founded on the equitable principle that a father making a distribution of his property by will among his children, means to give to each the amount which he ought to have, in view of the claims of all upon his bounty; and if he afterwards deems it proper to make an advancement to one or more of them, the amount thus advanced ought to be deducted from the portion of the child benefited. It is a rule adopted by courts of equity

to prevent a child from getting a double portion, an inequality which it is but fair to presume the testator did not intend. Shudal v. Jekyll, 2 Atk. 518; *ex parte* Pye, 18 Ves. 150; Suisse v. Lowther, 2 Hare, 424; Pym v. Lockyer, 5 My. and Cr. 34; Kirk v. Eddoes, 3 Hare, 509; Hopwood v. Hopwood, 7 H. L., 726.

"And if the money is advanced or paid by the father under such circumstances as not to raise a presumption of satisfaction of the legacy, parol evidence may be offered to show that such was his intention."

A long line of American authorities in point is given at page 613 of volume 1 of the American and English Encyclopædia of Law, second edition.

Declarations of a testator, whether made in the legatee's presence or not, are competent evidence to prove an ademption.

Van Houten v. Post, 32 N. J. Eq., 709.

The question of what gifts are *ejusdem generis,* frequently becomes one of the intention of the testator, and such intention, rather than the character of the property, will determine.

1 Am. and Eng. Enc. Law (2d ed.), 619.
Jones v. Mason (Va.), 16 Am. Dec., 761 (*supra*).

In this case the intention is proved, so that a gift of money would be *ejusdem generis,* even if there were no equitable conversion.

In loco parentis means in place of the parent. "Said of a person invested with the rights and charged with the duties of the parent of a child, as a guardian." (Anderson's Law Dictionary.)

After the father's death the mother is head of the family and is bound to support the child if able.

Brown's Dom. Rel., 73.
Dedham v. Natick, 16 Mass., 140 .

Certainly it cannot for a moment be argued with any seriousness that there is any legal duty on the part of a father to provide by will for a child. Is the moral duty any stronger on the part of a father than of a mother?

An attempt is made to make it appear that Walter W. Payne was a residuary legatee. The will in the case at bar does not specifically provide for residuary legatees. Even if a legacy is a part of the residuary estate it is nevertheless adeemed by advances.

Williams on Executors, [1334].
Van Houten v. Post, 33 N. J. Eq., 709, 712 (*supra*).
Carmichael v. Lathrop, 108 Mich., 473, 478.

It can make no difference in the disposition of the case at bar whether the moneys given Walter W. Payne by the testatrix be treated as an advancement or as money loaned to him by her. The result must be the same. There can be no question that he got the money. The evidence as to that fact is satisfactory, and is uncontradicted. If it is held that these were loans to Walter W. Payne by his mother, then it is the duty of the Executor to set them off against Walter W. Payne's legacy.

> "The indebtedness of a legatee or distributee constitutes assets of the estate, which it is the executor's or administrator's duty to collect for the benefit of creditors, legatees, and distributees. Hence such indebtedness may be deducted from any legacy or distributive share of the debtor."

2 Woerner's Am. Law of Adm., 2d ed., sec. 564.
Gosnell v. Flack, 76 Md., 423, 426.
Bailey's estate, 156 Pa. St., 634.
Smith v. Kearney, 2 Barb. Ch. (N. Y.), 533, 547.
Courtenay v. Williams, 3 Hare's Ch. Rep., 539.

An assignee stands in the same relation to the estate as the heir would if he had not assigned. Since the assignee can have no greater right in a legacy or distributive share than the assignor possessed, it is obvious that any right of equitable set off or retention which existed against the assignor is good against the assignee.

2 Woerner's Am. Law of Adm., 2 ed., sec. 563.
Ford v. O'Donnell, 40 Mo. Ap., 51, 59.
Hopkins v. Thompson, 73, Mo. Ap., 401, 405.
Koons v. Mellett, 121 Ind., 585, 591.
Streety v. McCurdy, 104, Ala., 493, 501.
Manifold's estate, 5 Watts and Sarg. (Pa.), 340.
Springer's Appeal, 29 Pa. St., 208, 210.
Strong's Ex. v. Bass, 35 Pa. St., 333, 334.
Nickerson v. Chase, 122 Mass., 296, 297.
Smith v. Smith, 13 N. J. Eq., 164, 167.

In arguing the matter of set-off learned counsel for appellant are disingenuous. The cases cited by them are cases of counter-claims in lawsuits, and of course are not in point.

The authorities we cite fit the very matter we have in hand, and are conclusive as to our right—if it should be held that the advances to Walter W. Payne were loans and not advancements—to deduct the amount from his distributive share.

A purchaser of an heir's interest in real estate is liable to the same equity as in the case of an assignment of an interest in personal estate. It is his duty to inquire into the debts of

the decedent. He purchases at the risk of discharging all liens in favor of as well as against the estate.

Manifold's Estate, 5 Watts & Sarg. (Pa.), 340 (*Supra*).

Appellant bought Walter W. Payne's interest in his mother's estate without knowing whether he had any interest under the will, and he bought it with actual notice of the fact that Walter W. Payne had been advanced money by his mother. This should have put him on inquiry. Having made no inquiry among those who would be apt to know the real state of affairs, he must be charged as though he had notice of the whole transaction.

Even if it were true—which we do not for a moment admit—that the Executor would be bound by a statement made in the inventory, yet that could not work an estoppel as to the other legatees. He is not their representative.

It is argued on behalf of appellant that it is necessary for a purchaser from a *"devisee"* to ascertain only whether the personalty of the testator is sufficient to pay debts, and that he is not bound to inquire whether the *"devisee"* is indebted to the estate. In support of this proposition they cite the case of Gibson v. McCormick, 10 G. and J., 65.

After a careful reading of this long case we fail to see how counsel can state that this case sustains their position. At page 105 the Court expressly declined to state an opinion as to whether a purchaser was in any event protected.

In the case at bar appellant is not a purchaser from a *devisee,* but is an assignee of a *legatee.* According to his own testimony, he made no inquiry except as to whether Walter W. Payne had previously disposed of his interest in his mother's estate. He really did not know whether he was buying real estate or personal property. In fact, according

to his own showing, he did not know whether he was buying any interest. In other words, he was taking a gambler's chance.

Even if he did not actually know that Walter Payne's interest was that of a legatee of personal property, the law imputes such knowledge to him. Possessing such knowledge, he was put on inquiry. It was his duty to ascertain the condition of affairs, and he cannot defend upon the ground that he had no notice. If he had used only ordinarily reasonable diligence he would have ascertained the true state of facts. To support this proposition we cite their own case of Gibson v. McCormick, 10 G. and J., 65 at pages 105-106.

The fact that an inventory had not been filed by the Executor at the time appellant purchased the assignment from Walter W. Payne would not operate to relieve appellant from inquiry. He in fact made no inquiry. If he had he would have discovered the absence of an inventory. This should have put him on his guard, and it would then have been his duty to make inquiry from those who could have informed him.

The Executor was not compelled to bring suit. Why should he waste the substance of the estate in useless litigation? No one knew better than he that Walter W. Payne was wholly irresponsible financially and insolvent. Therefore, it was not improper to rely on his right to deduct any debt of Walter's to the estate from his distributive share.

To demonstrate that he had this right, we quote briefly from the case of Gosnell v. Flack (cited *supra*):

> "The right of an administrator to retain from the share of a distributee the amount due by the latter to the intestate out of whose estate he is entitled to a share is undeniably clear. Smith v. Donnell, 9 Gill, 84; Man-

Where the debt has been incurred to the estate itself by the distributee as administrator after decedent's death. 2 Woerner on Adm. Sec. 564

ning v. Thurston, 59 Md., 218. The first proposition has been the settled law of Maryland for many years."

As stated by the Court in the case just quoted from, on page 427, unless this were so, a distributee would "receive not only his full share but that share augmented by the amount of his indebtedness."

That is just what is sought to be done here. If it is found that these were loans, then Walter Payne—for the situation is not altered by the fact that he assigned to appellant—would get the large amount he already has had from his mother and his distributive share as well. If this could be done it would only be necessary for a distributee or legatee to collude with another by making an assignment to defeat one of the plainest equitable principles.

Appellant in his own handwriting in the pass-book admits that he had *actual* notice that these moneys were obtained by Mrs. Payne for her son Walter. So that there is absolutely no foundation to his claim that he is a *bona fide* purchaser without notice.

The Executor was under no obligation to run after appellant and tell him that Walter W. Payne's right to a distributive share in the estate was wiped out by the moneys that had been advanced him by his mother. The company of which appellant is secretary acted as agent for the Executor in disposing of the two pieces of real estate. As was its duty to do, it turned over the proceeds of the first sale to the Executor. When it came to the second sale, appellant and his attorney knew that Walter's share was disputed, and it was for that very reason the agreement was reached to place the money in the hands of Messrs. Wilson and Thompson as trustees.

In the case of the second sale appellant was the moving

party, forcing the Executor to sell under threat of partition proceedings.

Before any sale of real estate had been consummated the inventory was filed, which contained notice to the world that Walter W. Payne would be charged with the moneys received by him from the testatrix.

There is no testimony in the record of any acts on the part of these appellees to bear out the statement that appellant was lulled into doing anything. As just stated, he was insistent on the sale being made at that time.

The mere recording of his assignment does not place appellant in any stronger position than he would otherwise occupy.

From this it will be at once seen that the well-known principle announced in the case of Daingerfield v. Williams has no application in the case at bar.

The jurisdiction of the Probate Court to hear and determine this controversy, even if counsel for the assignee of Walter W. Payne's share had not consented to this proceeding, is complete. Section 119 of our Codes provides that—

> "It [the Probate Court] shall have full power and authority * * * to hear, examine, and decree, upon all accounts, claims and demands existing between executors and administrators and legatees, or persons entitled to a distributive share of an intestate's estate * * *"

In conclusion, we submit that the moneys which Walter W. Payne already received from his mother should be deducted from his distributive share of her estate. It would

be unconscionable; it would be violative of all principles of fair dealing and equity; it would be destructive of that just policy of the law which favors the equalization of portions among children, to permit this appellant to take Walter W. Payne's distributive share of his mother's estate after her death, when Walter W. Payne himself received advances from his mother during her lifetime of more than half of her estate.

Respectfully submitted,

CHARLES T. HENDLER,
SMITH THOMPSON, Jr.,
Attorneys for Appellees.

IN THE

Court of Appeals of the District of Columbia

J. BARTON MILLER, *Appellant,* v. JOHN E. PAYNE, Executor, et al., *Appellees.*	No. 1682. October Term, 1906.

Counsel for the appellant deem it of importance to call to the especial attention of the Court the following contentions which have not been adequately set out in appellant's main brief herein:

I. The acts by which the appellees exercised their election and reconverted the estate of their testatrix to realty.

The real estate was by the terms of the will to be sold at the expiration of a year and the proceeds divided equally among testatrix's five children. If the property had been sold at that time by the executor there could be no question but that the original conversion of the realty into personalty would have been complete. However, before the expiration of that time, to wit: by deed dated March 15th, 1905, and recorded March 24th, 1905, in Liber 2906, folio 27, of the Land Records of the District of Columbia, the appellees, together with appellant, conveyed certain property acquired by Priscilla R. Payne

in her lifetime, "of which she died seized leaving the said John E. Payne, Lorraine E. Holder, Harry S. Payne, Lillie M. Merrill, together with Walter W. Payne, *her sole heirs at law and devisees.*"

The above language is quoted from the deed.

Could any more definite election have been made?

Having thus put themselves on record as heirs at law and devisees, can they now be permitted to say that they are neither, but legatees?

This deed, as has been suggested by the Court, operated by way of estoppel, and the above recital therein may be equally well said to estop the appellees to now contend that they are legatees of a fund against which advancements to a co-legatee may be set off.

In the second deed made by these parties, executed September 30, 1905, they describe themselves in the same manner—*i. e.*, as "devisees and heirs at law."

II. If Section 1630 of the Code of the District can in anywise be construed as a repeal of the definite rule of law that a gift of money can have no effect on a share of real estate devised or descended—which counsel for the appellant deny—then the final provision of that section has not been met. The section reads, "shall be so deemed in all cases in which it shall appear from parol or other evidence to be so *intended.*"

Only one witness, who can in any way be called disinterested, testified on this point, and he referred to the transactions between mother and son as loans. (Testimony of Ezra W. Raub, Record, page 17.)

But the best evidence that Mrs. Payne did not intend that these gifts or loans of money to her son Walter should be in satisfaction of his share of her estate at her death, is to be found in the discrepancy between the amount of the money so given or loaned to him and the value of his share of her estate. If she had intended to

maintain an equal division of h
children, she would hardly have
half of it.

III. Finally, counsel for the
it to the attention of the Court t
recited is dated March 15, 1905,
day by some of the parties, by oth
On this last date the executor file
money and debts, which contained the
constructive, of any intention to cont
Walter W. Payne or his assignee, the ap

Although this proceeding was had
Court, it is perfectly apparent, of course,
analysis it is nothing but a proceeding in
aside a deed—*i. e.*, the deed from Walter
the appellant.

If this be so, then the case is controlled by t
maxim that "He who seeks equity, must do

The application of this maxim to the case
evident.

Miller, it is conceded, paid $200 for the con
from Walter W. Payne.

The appellees desire to strike down and destro
deed, not only without tendering, but actually ref
to repay the $200 paid by Miller, and the decree be
by its necessary consequence, sets aside the deed to Mil
without in anywise recognizing the settled equitable prin-
ciple above referred to.

The maxim is so imbedded in natural justice that it forms one of the principal foundation stones of the edifice of equity jurisprudence which has been erected through the centuries by the labor and wisdom of eminent chancellors.

It is therefore really unnecessary to cite authority in

ut the following cases, especially
y state and enforce the rule:

nnson, 46 N. Y., 615.
rmehle, 1 Appeals D. C., 359.
loe, 8 Wallace, 557.
Ware, 20 Wallace, 14.
R. Co., 109 U. S., 522.

ywise waiving any of the contentions
f, counsel for the appellant respectfully
enforcement of the maxim above relied
requires the reversal of the decree below.

JESSE H. WILSON,
JESSE H. WILSON, JR.,
JOHN RIDOUT,
Attorneys for Appellant.